88-7

No.
October Term, 1988

In the Supreme Court of the United States

WEST PENN POWER COMPANY, a corporation,
Defendant-Petitioner,

v.

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE's HOLIDAY HARBOR, A Partnership and as Representative of a Class,
Plaintiffs-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPERIOR COURT

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QUESTION PRESENTED

Where the Federal Power Act provides for exclusive jurisdiction in the Federal District Courts over actions at law seeking damages caused by the maintenance or operation of a hydroelectric project maintained and operated under a license issued by the Federal Energy Regulatory Commission, may state courts disregard the exclusivity provision of the Act and entertain subject matter jurisdiction over such actions?

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TABLE OF AUTHORITIES

CASES

PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPERIOR COURT

The Petitioner[1] prays that a Writ of Certiorari issue to review the Order and Opinion of the Superior Court of Pennsylvania entered August 25, 1987.

OPINIONS BELOW

The Order of the Supreme Court of Pennsylvania, which has not been reported officially, appears in the Appendix hereto (App. A). The Order and Opinion of the Superior Court, reported at 366 Pa. Super. 104, 530 A.2d 913 (1987), appears in the Appendix hereto (App. B). The Order as amended and Opinion of the Court of Common Pleas of Washington County, which has not been reported officially, appears in the Appendix hereto (App. C).

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[1]Petitioner West Penn Power Company, a corporation, has the following parent, subsidiary and affiliate companies:

1. Parent: Allegheny Power System, Inc.
2. Affiliates:
   a. Allegheny Power Service Corporation
   b. Monongahela Power Company
   c. The Potomac Edison Company
3. Subsidiaries:
   a. West Virginia Power and Transmission Company
   b. West Penn West Virginia Water Power Company
4. Subsidiaries which are partially owned by West Penn Power Company:
   a. Allegheny Generating Company
   b. Allegheny Pittsburgh Coal Company

JURISDICTION

The Order and Opinion of the Pennsylvania Superior Court was entered on August 25, 1987. The Pennsylvania Supreme Court denied Petitioner's Petition for Allowance of Appeal on April 11, 1988.

The jurisdiction of this Court to review the Order and Opinion of the Pennsylvania Superior Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

Section 10(c) of Chapter 12 of the Federal Power Act, contained at 16 U.S.C. § 803(c) (and referred to hereinafter only by citation to the U.S. Code), provides, in pertinent part, as follows:

> Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works . . . constructed under the license . . .

Section 317 of Chapter 12 of the Federal Power Act, contained at 16 U.S.C. § 825p (and referred to hereinafter only by citation to the U.S. Code), which was added to the Act in 1935, provides that:

> The District Courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

STATEMENT OF THE CASE

Petitioner, West Penn Power Company, operates the Lake Lynn hydroelectric project which is licensed by the Federal Energy Regulatory Commission ("FERC"). The Dam is located on the Cheat River in West Virginia.

Approval for the construction of the Lake Lynn project originally was issued by the State of West Virginia but, because the Cheat River was navigable, the design also required approval by the Secretary of War. The July 3, 1912 approval constituted a fifty-year permit which expired on July 2, 1962. The permit was originally issued to Mountain Park Land Company. West Penn Power Company subsequently acquired the Lake Lynn Dam from a third party after a series of transactions. On October 21, 1970, the Federal Power Commission[2] issued an Order Issuing License (Major), granting West Penn Power Company a license effective from July 3, 1962 through December 31, 1993.[3]

Respondents (hereinafter "plaintiffs") purport to represent a class of plaintiffs damaged by flood waters allegedly caused by the existence and operation of West Penn Power Company's federally licensed hydroelectric

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[2]Congress initially enacted "The Federal Water Power Act" on June 10, 1920. That Act created the Federal Power Commission ("FPC") which was given the responsibility, *inter alia*, of licensing non-Federal hydroelectric power projects which affect navigable water or affect the interests of interstate commerce. That Act also requires the FPC to license projects that are adapted to a comprehensive plan for improving or developing a waterway or waterways. That Act was incorporated into the Federal Power Act in 1935. The Federal Power Act extended the FPC's authority to regulate the interstate aspects of the electric power industry. 16 U.S.C. §§ 791a—828c.

[3]The documents which appear in the Appendix (App. G) are attached as Appendix H to West Penn Power Company's Petition for Allowance of Appeal to the Pennsylvania Supreme Court.

dam. Plaintiffs filed their class action complaint in the Court of Common Pleas of Washington County, Pennsylvania.[4] Count I (App. E) alleges in substance that West Penn Power Company operated its dam negligently. Count II (App. F) alleges that the very existence of Lake Lynn Dam creates an abnormally dangerous instrumentality.[5]

The flood waters about which plaintiffs complain originated in the Cheat River basin upstream from the Lake Lynn Dam during or immediately preceding Election Day in November, 1985. The flood is commonly known as the Election Day Flood. During the flood, substantial rain fell in the Cheat River basin, the runoff from which caused unprecedented flooding and the flood of record along the Cheat River upstream from the Dam. That flood was of a magnitude such that it would occur no more often than once every five hundred years.

Violations of FERC orders, rules, etc. are presented in substance in plaintiffs' Complaint, as amended, thereby challenging the federal regulatory scheme administered by FERC. Article 33 of West Penn Power Company's license states, in pertinent part, as follows:

> The licensee shall not release from Lake Lynn reservoir, during flood periods, flows that will exceed those

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[4]Other non-class action cases have been filed against West Penn Power Company in the Pennsylvania state courts in Westmoreland (two cases) and Fayette (one case) Counties as well as Washington County (four additional cases) each challenging the manner of operation of the Lake Lynn Dam and all but one asserting that the presence of the Dam upstream from plaintiffs creates an abnormally dangerous instrumentality thereby challenging FERC's authority to approve and license hydroelectric dams.

[5]Plaintiffs amended Count II of their Complaint on September 11, 1986, after West Penn Power Company had challenged, *inter alia*, Count II of the original Complaint and the trial court sustained that challenge.

> which would have occurred in the absence of the project. Project operating procedures to assure compliance with this requirement shall be developed cooperatively by the Licensee and the District Engineer, U.S. Army Engineer District, Pittsburgh.

App. G.

Allegations in the Complaint, as amended, which challenge the operation of the Dam and thus the license are contained in paragraphs 17 and 20 through 27 of Count I (App. E) and paragraphs 33 through 41 of Count II (App. F). Count I alleges negligence in the operation and maintenance of the Dam. Count II seeks damages under an abnormally dangerous instrumentality theory and challenges the propriety of the existence of hydroelectric dams as follows:

> 39. The operation of a hydro-electric power dam at a location above-stream of residential and commercial structures and activity is inappropriate because of the inherent risk involved in its operation.
>
> 40. The release of waters from the dam's lake located above-stream of residential and commercial structures and activity is inappropriate because of the inherent risk involved in such releases.
>
> 41. The benefits of the hydro-electric power dam at its location above-stream of residential and commercial property and activity is outweighed by its inherently dangerous attributes.

App. F.

In the plaintiffs' Motion for Class Action Certification which was filed by the plaintiffs on February 22, 1988, the two common questions of fact alleged were:

(a) Whether Defendant West Penn operated the reservoir of the dam in such a way that the dam obstructed and/or released improperly flood waters as if the dam were not present, thus exacerbating the flood wave and the effects of the flooding downstream of the dam; and

(b) Whether Defendant West Penn failed to notify the residents of Washington County through its failure to include Washington County Emergency Management personnel in the Emergency Action Plan developed by West Penn.

The foregoing averments place the issues of violation of Article 33 of the License and the Emergency Action Plan[6] as the predominant questions of fact for resolution in any class action that would be certified, thereby seeking to contradict FERC's authority and the federal regulatory scheme. Coupled with the allegations of the Complaint, as amended, the above-quoted averments of the Motion for Class Action Certification place at issue the existence of hydro-electric dams. The Motion for Class Action Certification clarifies the issues in the Complaint, as amended, and demonstrates the challenge to FERC's regulation of the operation of the Dam and the necessity for this Petition for Writ of Certiorari.

Plaintiffs' action was removed by West Penn Power Company to the United States District Court for the Western District of Pennsylvania, pursuant to 28 U.S.C. §§ 1441-1452. West Penn Power Company's Removal Petition asserted, *inter alia,* that the state court had no jurisdiction because plaintiffs' claims are subject to the exclu-

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[6]Emergency Action Plans for all FERC-licensed hydroelectric projects are required to be submitted to FERC for approval and are required to comply with FERC Regulations. 18 C.F.R. §§ 12.20-12.25.

sive jurisdiction of the federal district courts under the Federal Power Act (hereinafter sometimes the "Act"), codified at 16 U.S.C. §§ 791a-828c. The federal district court declined to decide the issue of exclusive federal jurisdiction and remanded the case to the state court on other grounds. (App. D, page D-8)

In Preliminary Objections subsequently filed in the Court of Common Pleas of Washington County, West Penn Power Company raised, *inter alia,* the issue of exclusive subject matter jurisdiction under the Federal Power Act. That court dismissed the Preliminary Objection on the issue of jurisdiction by its Opinion and Order of August 4, 1986. (App. C). On December 16, 1986, the Pennsylvania Superior Court granted West Penn Power Company permission to appeal. Thereafter, West Penn Power Company appealed from the Order, as amended on August 18, 1986, to the Pennsylvania Superior Court.

On appeal, the Superior Court modified the Order of the Court of Common Pleas, but held that the state courts of Pennsylvania do have jurisdiction to hear and decide the claims that plaintiffs have made in their Complaint. (App. B).

The Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania on September 23, 1987. On April 11, 1988, that Court denied the Petition. (App. A).

REASONS FOR GRANTING THE WRIT

This case presents the Court with a matter of first impression concerning a State's authority to regulate the activities of a federally owned or licensed hydroelectric dam. This is not a local issue. It, and the effect on the more

than 1600 federally owned or licensed hydro-electric dams,[7] raises a question of national significance, to wit, whether the Congressional scheme for federal regulation of hydroelectric dams may be abridged or defeated by disregard of clear statutory language by state courts.

The fundamental question is the effect which must be given to two explicit provisions of a federal act relating to hydroelectric projects located on or affecting the navigable waters of the United States. Furthermore, because of Count II of plaintiffs' Complaint, as amended (App. F), a question is raised which challenges FERC's authority to approve and license hydroelectric dams. In other words, can a hydroelectric dam, properly authorized by and constructed, operated and maintained in accordance with the mandates of FERC, be determined to be an abnormally dangerous instrumentality by a state court?

I. The Federal Power Act Establishes the Exclusive Jurisdiction of the Federal Courts Over this Case

A. The Plain Language of the Act Establishes Exclusive Federal Jurisdiction

Sections § 803(c) and 825p of the Federal Power Act, quoted in pertinent part at p. 2, *supra,* state that the District Courts shall have exclusive jurisdiction. There is no legislative statement to the contrary and the language is explicit, conclusive, and consistent with the underlying Congressional scheme. *Escondido Mut. Water Co. v. LaJolla Bank of Mission Indians,* 466 U.S. 765, 772, 104 S.Ct. 2105, 80 L.Ed.2d 753, 761 (1984).

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[7]There are approximately 1600 federally owned or licensed hydroelectric power plants located in 47 states. (App. I).

B. Exclusivity Of Jurisdiction Is Consistent With The Congressional Scheme

By the Federal Power Act, Congress created a comprehensive federal licensing and regulatory scheme for water power projects (such as the Lake Lynn Dam) utilizing or affecting the navigable waters of the United States, or other waters over which Congress has jurisdiction. *Federal Power Comm'n v. Union Electric Co.,* 381 U.S. 90, 85 S.Ct. 1253, 14 L.Ed.2d 239 (1965). That comprehensive federal scheme of regulation is demonstrated by the Federal Power Act's preempting of the states' authority to regulate hydroelectric facilities governed by the Act and the vesting in FERC of exclusive jurisdiction to license and regulate those facilities. *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians,* 466 U.S. 765, 773, 104 S.Ct. 2105, 2110, 80 L.Ed.2d 753, 761 (1984); *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n,* 328 U.S. 152, 168, 66 S.Ct. 906, 913, 90 L.Ed. 1143, 1151 (1946). The Federal Power Act provides the substantive framework for the issuance of licenses for hydroelectric projects, and the control of those projects by FERC, including the maintenance and operation thereof.

The Federal Power Commission, by incorporation of the following language into licenses such as West Penn Power Company's, recognizes the primacy and exclusivity of federal jurisdiction over the navigable waters of the United States and the hydroelectric projects thereon:

> *Article 29.* The right of the Licensee and of its Transferees and successors to use or occupy waters, *over which the United States has jurisdiction,* under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless Licensee has obtained a new

> license pursuant to the then existing laws and regulations or an annual license under the terms and conditions of this license.
>
> *Article 30.* The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

(Emphasis supplied.) Form L-3 (revised September 1, 1968), Terms And Conditions Of License For Constructed Project Affecting Navigable Waters Of The United States (incorporated by reference into *Order* Issuing License To West Penn Power Company Power Company, Project No. 2459, Issued October 21, 1970). (App. G).[8]

There are at least three important considerations which underlie Congress' mandate of exclusive jurisdiction. First, hydroelectric projects are routinely constructed on major waterways—the navigable waters of this country. Congress has historically acted to develop and protect the navigable waters, as evidenced by its enactment of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401-467n, and its predecessor statutes. Therefore, in addition to guaranteeing a uniform application of the Federal Power Act, the provisions relating to exclusivity of

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[8]It is significant that the Pennsylvania legislature recognized this mandate by enacting the following statutory provision:

> A power dam or change in stream to develop power shall be deemed to be *within the jurisdiction of the United States*, within the meaning of this section, whenever (1) such dam or change is constructed or made, or to be constructed or made, in or upon navigable waters of the United States, or (2) the Federal Power Commission shall have found that the interests of interstate or foreign commerce would be affected by the construction of such dam or the making of such change.

32 P.S. § 592 (Purdon 1967) (emphasis supplied).

jurisdiction also guarantee that the regulation of major hydroelectric projects in this country will develop in a manner consistent with the federal statutes, case law and administrative rulings governing navigation and navigable waters.

Second, because the vast majority of federally owned or licensed hydroelectric projects are located on major waterways flowing through more than one state, damages associated with a single incident of flooding or in some other way related to the operation of hydroelectric projects could occur in several different states. Such an eventuality has occurred in this case; the alleged cause of the flooding which occurred in Pennsylvania is the operation of defendant's dam, which is located in West Virginia. (Complaint, ¶¶ 1, 6, 12, App. E).

In cases in which the operation of a hydroelectric project affects residents of more than one state, unless there is exclusive federal jurisdiction, the project operator could be subject to inconsistent rulings throughout the geographical area downstream from the project. So here, if property damage claims had been filed in West Virginia, in addition to the burden of having to try the case twice in two different jurisdictions, the defendant could be faced with one result in West Virginia and a different one in Pennsylvania.[9] However, if state courts recognize Congress' mandate of exclusive federal jurisdiction, such an operator could utilize the multi-district litigation provisions of the federal law and ensure itself of consistency in the standards by

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[9]For example, it is not at all inconceivable that the courts of one state could hold that the defendant's dam is a dangerous instrumentality, and the courts of the other rule that it is not, and the defendant as well as the federal government would be faced with conflicting obligations.

which it is judged and the liabilities for which it is responsible. *See* 28 U.S.C. §§ 1404 and 1407. *See also* Preliminary Study of Complex Litigation, Report, pages 48 to 54 (American Law Institute, March 31, 1987) which appear in the Appendix hereto (App. J).

Finally, this Court has recognized that a purpose of the Federal Power Act is the comprehensive development of water power. *Chemehuevi Tribe of Indians v. Federal Power Comm'n.*,420 U.S. 395, 95 S.Ct. 1066, 43 L.Ed.2d 279 (1975). The subjection of licensees under the Act to inconsistent adjudicatory results in different state forums is analogous to a grant of veto power to the states over federal approval for power projects under the Act.

Here, the Federal Power Commission issued a license to West Penn Power Company for the operation of the Lake Lynn project. That license, issued by Order and pursuant to (and including obligations to comply with) the rules, regulations and orders prescribed by the Act, contains a comprehensive recitation of West Penn Power Company's duties and liabilities in connection with the maintenance and operation of the Lake Lynn Dam.

The plaintiffs' Complaint, as amended, and the Motion for Class Action Certification raise the question of whether West Penn Power Company violated its federal license and otherwise violated FERC orders. In addition to the judicial procedural history of this case recited heretofore, it is significant that FERC investigated West Penn Power Company's operation of the Lake Lynn Dam during the Election Day Flood and found West Penn Power Company without fault. The testimony of FERC's Ronald A.

Corso[10] on the two common issues of fact raised by plaintiffs in their Motion for Class Action Certification is as follows:

> Pursuant to its authority under the Federal Power Act, the FERC licenses non-Federal hydroelectric projects. Therefore, the Commission has jurisdiction over the Lake Lynn project. The license for the Lake Lynn project was issued in 1970.
>
> In view of the committee's inquiry and pursuant to the Commission's regulations, the staff of the Division of Inspections has conducted its own independent investigation. We have reviewed hydrologic data and the project operation by the licensee during the flood event of November 4 and 5, 1985. Our review found that operation of the project was consistent with the license. We have also independently confirmed that the licensee did issue advance flood warnings in accordance with the procedures outlined in the Emergency Action Plan required by the Commission's regulations.
>
> In evaluating the operation of Lake Lynn Dam during this unusual flood event, it is important to note that the project was constructed for the primary purpose of generating hydroelectric power and that Lake Lynn has no storage capacity for flood control. Our review of the licensee's operation of the project powerhouse on November 4 and 5, 1985, to lower the reservoir

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[10]In response to interrogatories regarding the basis for some of the allegations contained in the Complaint, plaintiffs identified the testimony of Ronald A. Corso, Director, Division of Inspections, Office of Hydropower Licensing, Federal Energy Regulatory Commission given on February 7, 1986, at the Hearing before the Subcommittee on Water Resources of the Committee on Public Works and Transportation, House of Representatives. Mr. Corso's complete testimony appears in the Appendix hereto. (App. H).

and the subsequent operation of the spillway gates on November 4 and 5, 1985, indicates that the project did not have any significant effect on the peak flood flows that occurred downstream on the Monongahela River and Cheat River.

The spillway gates were gradually opened to pass the extreme flood flows that entered the reservoir. The unprecedented magnitude of the flood also created a large amount of debris that was trapped by the dam. While the debris did cause clogging of the spillway gates, our analysis indicates that this had no significant effect on the peak flows downstream of the project.

We also reviewed the licensee's procedures in implementing the emergency action plan required by the Commission's regulations. We contacted the Corps of Engineers and officials of Fayette and Greene Counties. All parties indicated that the licensee provided adequate notification and maintained communication throughout the flood event.

The license for the Lake Lynn project includes article 33, in the license pursuant to a recommendation by the Corps of Engineers at the time of licensing. Article 33 requires that the project be operated so as not to cause a flood peak greater than would have occurred in the absence of the project. Our review indicates that the licensee complied with the license requirement.

In conclusion, our review indicates that the licensee complied with the license for the Lake Lynn project and the Commission's regulations.

Thus, the amended state court Complaint raises issues already considered and resolved by the Congressionally created regulatory commission.

Because the issues of the execution of duties imposed by FERC and the license are strictly and solely within the purview of the federal district courts (by virtue of the grant of exclusive jurisdiction in Section 825p), lawsuits raising such issues must be heard by a federal district court.

C. The Federal Power Act Contemplates Tort Actions Only in the Federal Courts

Exclusivity of jurisdiction to review and evaluate the operation and maintenance of federally owned or licensed hydroelectric dams satisfies an important element in the Congressional regulatory scheme: that of having only one uniform judicial system of review.

To the extent that state claims arise in connection with a federally licensed hydroelectric project, the Federal Power Act provides for disposition through the federal district court system. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188 (1938). This is not a question of preemption of state law. However, to avoid the chaos which might result from a lack of exclusivity, the absence of the uniform system of review, and the impact that state judicial actions would have upon the controlling federal system, in many cases this Court has preempted state law. The petitioner is not contending for that result, but contends that exclusivity of jurisdiction and the problem of handling state causes of action are not inconsistent and are no different in this situation than in a diversity case or pendent jurisdiction case where state causes of action are presently litigated. Thus, although the petitioner does not claim preemption here, the following cases are cited merely to show the possible negative effect of state court involvement in the federal regulatory scheme.

It is well established that actions for compensatory damages have a strong regulatory effect and their regulatory consequences can interfere with the purposes of a federal statute. *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 815 n.19, 93 L.Ed.2d 883, 901 n.19 (1987); *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26, 101 S.Ct. 1124, 67 L.Ed.2d 258, 270 (1981); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47, 79 S.Ct. 773, 3 L.Ed.2d 775, 783-784 (1959).

> "[*R*]*egulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, and indeed is designed to be, a potent method of governing conduct and controlling policy.* Even the States' salutory effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

San Diego Bldg. Trades Council v. Garmon, 359 U.S. at 247, 3 L.Ed.2d at 784 (emphasis added).

This Court recently reaffirmed these principles in *International Paper*, in which it held that a common law nuisance action for compensatory damages from pollution was preempted by federal law. The Court held that permitting state law actions would create "a chaotic regulatory structure" and that if compensatory damages were permitted, the defendant "might be compelled to adopt different or additional means of pollution control from those required by the Act, regardless of whether the purpose of the relief was compensatory or regulatory." 107 S.Ct. at 815 n.19, 93 L.Ed.2d at 901, n. 19.

This Court has also held other damage actions preempted because their conflict with federal statutory purposes of uniformity was constitutionally unacceptable. In *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., supra,* the Court held that a state law action, including common law claims for damages for discontinuation of rail service, was preempted, concluding that:

> "It would vitiate the overarching congressional intent . . . to permit the State . . . to use the threat of damages to require a carrier to do exactly what the Commission is empowered to excuse. A system under which each State could through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress."

450 U.S. at 325-26, 67 L.Ed.2d at 270. *See also International Brotherhood of Electrical Workers v. Hechler,* 107 S.Ct. 2161, 55 U.S.L.W. 4694 (1987) (state common law tort claim for personal injuries preempted because of conflict with federal need for uniformity in interpretation of labor contracts); *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 211, 105 S.Ct. 1904, 85 L.Ed.2d 206, 215 (state common law tort action for bad faith handling of an insurance claim under a labor agreement preempted and barred because permitting the state law action threatened "[t]he interests in interpretive uniformity and predictability that require that labor contract disputes . . . be subject to uniform federal interpretation.").

Because of damage awards, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. at 247, 3

L.Ed.2d at 784. Damage awards become regulatory in effect.

Avoidance of a "chaotic regulatory structure" is the reason why United States District Courts have exclusive jurisdiction over the claims asserted by plaintiffs. It also explains Congressional intent in enacting Sections 803(c) and 825p.

Finally, if the causes of action presented by the plaintiffs are not within the exclusive jurisdiction of the federal courts pursuant to Sections 803(c) and 825p, then those jurisdictional sections of the Federal Power Act will be rendered a nullity.

II. The Issues Presented are Important to FERC, the United States Army Corps of Engineers and The Operators of Federally Licensed Hydroelectric Dams Throughout the United States

Two established federal agencies and the Congressional policies which they are charged with implementing would be significantly affected by plaintiffs' attempts to change the federal regulatory scheme through state court actions.

The first agency is FERC, which was created to implement, *inter alia,* the Federal Power Act, originally the Federal Water Power Act. Part I of the Federal Power Act was enacted to provide a means of comprehensive federal control over uses of the nation's water resources which the federal government has a legitimate interest in overseeing. These interests include navigation, flood control, irrigation, and, significantly, hydroelectric power. *Federal Power Comm'n. v. Union Electric Co.,* 381 U.S. 90, 98, 85 S. Ct. 1253, 14 L.Ed. 2d 239, 245 (1965).

Part I of the Federal Power Act "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so . . ." *First Iowa Hydro-Electric Corp. v. Federal Power Comm'n.*, 328 U.S. at 180, 90 L.Ed. at 1158.

The principal concern of the Federal Water Power Act was the development and regulation "of hydroelectric power to meet the needs of an expanding economy." *Union Electric,* 381 U.S. at 99, 14 L.Ed.2d at 246 (footnote omitted).

The second affected agency is the United States Army Corps of Engineers which, since the early years of our country, has been involved with inland transportation systems. Originally, the Army Corps of Engineers was charged with improving navigation by removing "snags" and constructing dams to provide a minimum three-foot navigation depth. Since that time, the Army Corps of Engineers has become the designer, builder and developer of our nation's navigable waterways and is currently acting under the Rivers and Harbors Appropriation Act of 1899, *supra,* as amended.

The two federal agencies and the Congressional policies which they are charged with administering are inseparable from the controversy which exists between the parties hereto. Plaintiffs' Complaint, as amended, challenges the core of the comprehensive federal regulatory scheme for hydroelectric dams and navigation by seeking to impose standards on West Penn Power Company other than those established by FERC in issuing the license for the Lake Lynn Dam. This challenge to agency regulation of

hydroelectric dams attacks the fabric of the federal regulatory scheme developed over the last century. Attempts to raise the issue that a hydroelectric dam is a dangerous instrumentality before state court fact finders, such as that of plaintiffs herein (Count II, App. F), could have drastic counterproductive effects. Congress did not intend that its policies be frustrated by a multitude of state courts. The Congressional policy should be carried out by federal courts unaffected by local considerations and attitudes.

This controversy is ripe for resolution. Determination of the state and federal relationships concerning the regulation of hydroelectric dams presents this Court with the necessity to resolve and uphold the Congressional requirement that the federal courts decide such issues.

Only by such review may this Court prevent possible state judicial interference with the regulation of federally licensed hydroelectric dams not only with respect to West Penn Power Company but with respect to similarly situated operators nationwide. Without this review, West Penn Power Company and other hydroelectric dam operators will be required to serve a multitude of masters, only one of which is acting to further the federal regulatory scheme.

III. The Pennsylvania Superior Court Did Not Have the Benefit of the Controlling Case of this Court and Misapprehended the Exclusive Jurisdiction Requirement of the Federal Power Act

This Court recently decided *Schneidewind v. ANR Pipeline Company*, ____ U.S. ____, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988), which is controlling. Although decided after the Superior Court's decision, *Schneidewind* makes it clear that the Pennsylvania Superior Court misinterpreted

and misapplied this Court's decision in *Pan American Petroleum Corp. v. Superior Court of Delaware,* 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1961).

The Pennsylvania Superior Court concluded that Sections 803(c) and 825p of the Federal Power Act did not mandate exclusive federal jurisdiction. The Superior Court reached its conclusion based principally upon a comparison of the provisions of the Federal Power Act with provisions of the Natural Gas Act, 15 U.S.C. §§ 717-717z.

In its Opinion dated August 25, 1987, the Pennsylvania Superior Court stated that:

> . . . our reliance upon Pan American is not unwarranted in light of Congressional debates indicating that:
>
> > 1) The Natural Gas Act was intended to operate similar to the Federal Power Act;
> >
> > 2) The Natural Gas Act was patterned after the Federal Power Act in the regulatory area;
> >
> > 3) The Natural Gas Act merely contained standard provisions which had been incorporated into other regulatory legislation, including the Federal Power Act; and
> >
> > 4) Congress intended to establish a fairly common rate making and regulatory scheme for interstate sales of natural gas similar to the Federal Power Act. (Citations omitted.)

Engle v. West Penn Power Co., 366 Pa. Super. at 112, 530 A.2d at 917. (App. B). The Superior Court continued to justify its reliance on the *Pan American* case by pointing out that the jurisdictional provisions of both the Natural

Gas Act and the Federal Power Act were identical. Therefore, the court reasoned that, because the *Pan American* case held that the Natural Gas Act did not "preempt" state contract actions, the Federal Power Act must operate in the same way. In light of the holding of *Schneidewind,* such action by the Pennsylvania Superior Court was error.

Pan American involved a similar legal question: whether the federal district courts had exclusive subject matter jurisdiction. However, *Pan American* concerned a contract dispute between private parties, not a tort action for violation of federal orders and regulations such as plaintiffs have brought here. The *Pan American* petitioners contended that, because the Natural Gas Act (15 U.S.C.§§ 717-717z) conferred on the district courts of the United States exclusive jurisdiction "of violations of this [statute] or the rules, regulations and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this [statute] or any rule, regulation, or order thereunder," that the Delaware courts had no jurisdiction in that case. 15 U.S.C. § 717(u). The *Pan American* petitioners contended that because the Natural Gas Act conferred such exclusive jurisdiction over violations thereunder, their cause of action was within the exclusive jurisdiction so conferred.

Schneidewind addressed the extent to which Congress regulates those matters to which the Natural Gas Act relates. This Court's decision in *Schneidewind* is applicable and demonstrates the Pennsylvania Superior Court's error. In *Schneidewind* this Court stated:

> The circumstances in which federal law pre-empts state regulation are familiar. See *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n,* 461 U.S. 375,

383 (1983). See also *Fidelity Federal Savings & Loan Assn. v De la Cuesta,* 458 U.S. 141, 152-154 (1982).

A pre-emption question requires an examination of congressional intent. *Id.* at 152. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. See, *e.g., Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 95-96 (1983). In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941.)" *California Coastal Comm'n. v. Granite Rock Co.,* 480 U.S. ____, ____ (1987) (slip op. 7), quoting *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248 (1984).

In this case we conclude that Act 144 regulates in a field the NGA has occupied to the exclusion of state law, and that it therefore is pre-empted.

Schneidewind, 99 L.Ed.2d at 325.

The Federal Power Act is no different. The federal government's regulation of hydroelectric dams so occupies the field as to preclude any state regulation including attempts at judicial regulation by state court decisions and instructions by local judges to juries. Operators of federally licensed hydroelectric dams should not be required to proceed through state court systems and ultimately to this Court when the problem can be resolved now by the grant of this Petition.

Additionally, the Pennsylvania Superior Court's decision is in error because the *Pan American* case was a contract action. This fact distinguishes it in all important respects from the case at bar. In fact, this Court stated in its opinion in *Pan American* that "*the fact that Cities Service sues in contract or quasi-contract . . . is decisive.*" *Pan American,* 366 U.S. at 664, 81 S.Ct. at 1308, 6 L.Ed.2d at 590 (emphasis supplied). This distinction is crucial, and has been recognized by at least one Circuit Court of Appeals in two recent cases in which that court has had occasion to refer to or rely upon the *Pan American* decision. *United Jersey Banks v. Parell,* 783 F.2d 360, 368 (3d Cir. 1986), cert. denied, 106 S.Ct. 2829, 90 L.Ed.2d 979, 54 USLW 3809 (1986) (distinguishing *Pan American* case from other "preemption" and "exclusive jurisdiction" actions because plaintiffs' Complaint sounded in contract) and *Exxon Corp. v. Hunt,* 683 F.2d 69, 74 (3d Cir. 1982), cert. denied, 459 U.S. 1104, 103 S.Ct. 727, 74 L.Ed.2d 952 (1983) (distinguishing *Pan American* in that it is a contract action).

Neither the Natural Gas Act nor the Federal Power Act purport to include, within the scope of the grant of

exclusive federal jurisdiction, liability for breach of contract. Private contract actions merely affect the rights of the parties vis-a-vis their prior agreement.

However, tort cases, such as the one at bar, affect the basic Congressional policy. It is corroborative of this point that Congress' explicit inclusion of tort liability with the exclusivity of jurisdiction provision and failure to include liability for breach of contract establishes the important distinction which must be maintained between the situation presented in the *Pan American* case, and the situation presented in the case at bar.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Date: July 1, 1988

88-7

No.
October Term, 1988

In the Supreme Court of the United States

WEST PENN POWER COMPANY, a corporation,
Defendant-Petitioner,

v.

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE's HOLIDAY HARBOR, A Partnership and as Representative of a Class,
Plaintiffs-Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPERIOR COURT

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Date: July 1, 1988

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APPENDIX TO PETITION
FOR A WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPERIOR COURT

APPENDIX A

The Supreme Court of Pennsylvania Western District

April 11, 1988

HAROLD R. SCHMIDT, ESQUIRE
RICHARD DiSALLE, ESQUIRE
BRIAN W. ASHBAUGH, ESQUIRE
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In Re: John H. Engle, William R. Engle, William C. Engle, t/d/b/a Engle's Holiday Harbor, a partnership and as representative of a class v. West Penn Power Company, a corporation
No. 450 W.D. Allocatur Docket 1987

Dear Messrs. Schmidt, DiSalle, Ashbaugh, Crumrine and Ms. Johnston:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

"April 11, 1988
Petition denied
Per Curiam

Mme. Justice Stout did not participate in the consideration or decision of this matter."

Very truly yours,

IRMA T. GARDNER
DEPUTY PROTHONOTARY

ITG: cs
cc: C. James Zeszutek, Esquire
Diana L. Reed, Esquire
Gaylord W. Greenlee, Esquire
Hon. Samuel L. Rodgers

APPENDIX B

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, A PARTNERSHIP AND AS REPRESENTATIVE OF A CLASS
v.
WEST PENN POWER COMPANY, A CORPORATION,
Appellant

No. 1722
Pittsburgh 1986

ORDER

AND NOW, this 25TH day of AUGUST , 1987, it is ordered as follows:

_____ Order affirmed.
_____ Order reversed.
_____ Judgment affirmed.
_____ Judgment of Sentence affirmed.
_____ Judgment of Sentence reversed.
_____ Order vacated and lower court directed to proceed in accordance with opinion filed herewith.
__X__ Order modified as set forth in opinion filed herewith.
Jurisdiction relinquished.
_____ Costs to be taxed as provided by Chapter 27 of the Pa.R.A.P.
_____ Costs to be taxed as provided in opinion filed herewith.
_____ Appeal quashed.

BY THE COURT

ELEANOR R. VALECKO
DEPUTY PROTHONOTARY

**IN THE
SUPERIOR COURT
OF PENNSYLVANIA**

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, A PARTNERSHIP AND AS REPRESENTATIVE OF A CLASS

v.

WEST PENN POWER COMPANY, A CORPORATION,
Appellant

**No. 01722
Pittsburgh 1986**

Appeal from the Order of the Court of Common Pleas, Civil Division, of Washington County at No. 271 November Term, 1985

BEFORE: DEL SOLE, POPOVICH and MONTGOMERY, JJ.

FILED: AUGUST 25, 1987

OPINION BY POPOVICH, J.:

This is an appeal from an interlocutory order granted by permission by Superior Court to the appellant/defendant, West Penn Power Company. See Pa.R.App.P. 312; 42 Pa.C.S. § 702(b).

The record discloses that in November of 1985 the plaintiffs John H. Engle, William R. Engle and William C. Engle, t/d/b/a Engle's Holiday Harbor, a partnership, sought certification as representatives of a class in excess of fifty members whose property suffered damages due to the defendant's alleged negligence in the operation of its Lake

Lynn hydro-electric dam on the Cheat River in West Virginia.

The plaintiffs averred in their class action complaint that, inter alia, the commonality of questions of law and fact, when coupled with the complexities of the issues and the economies of scale that could be achieved by litigating the claims together, warranted that they be denominated representatives of the class action suit.

The two-count complaint sounded in negligence and alleged the defendant's maintenance of a dangerous instrumentality (the hydro-electric power dam) and the resultant imprudent release of water retained thereby, which, purportedly, was the direct and proximate cause of flooding in the area for which damages in excess of ten thousand dollars were being sought by the plaintiffs on behalf of the class once representative status was bestowed upon them.

Next of record appears preliminary objections, filed by counsel for the defendant, raising a question of jurisdiction. It was recounted therein that the dispute had been removed, by the defendant, to the United States District Court for the Western District of Pennsylvania. In a Memorandum Opinion filed by the Honorable Alan N. Bloch, the case was remanded to Common Pleas Court upon a finding that the claims of negligence and maintenance of a dangerous instrumentality were state law claims. In support thereof, Judge Bloch wrote:

> Under the "well-pleaded complaint" rule, a defendant "may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law. Franchise Tax Board [v. Construction Laborers Vacation Trust], 463 U.S. [1] at 10 [(1983).]"

(Memorandum Opinion at 3)

Because the face of the complaint could not be read as raising a federal question (under 28 U.S.C. § 1331) without reference to the petition seeking removal, the District Court concluded that removal was not called for and remanded. However, in footnote 3, the District Court reserved its ruling on the merits of the defendant's contention that the plaintiffs' claims were within the exclusive jurisdiction of the federal courts,[1] and, as a result, the defendant was free to raise this question in Common Pleas Court. It did so.

In an opinion and order dated August 4, 1986, Common Pleas Court dismissed the defendant's preliminary objections in regard to subject matter jurisdiction, but it granted the defendant's demurrer to count II of the plaintiff's complaint, in that insufficient assertions had been made as to the maintenance of a hydro-electric dam being a dangerous instrumentality. Twenty days were afforded to amend the complaint.

On the question of class description, the defendant's objections thereto were dismissed without prejudice. Thereafter, a "Petition To Amend Order To Certify Controlling Question Of Law And To Stay Proceedings Pending Appeal" was filed by counsel for the defendant. The Petition was granted by order dated August 18, 1986, and, with Superior Court subsequently granting permission to appeal, the matter is presently before us for resolution.

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[1]The procedure followed by the District Court was a proper one. See Franchise Tax Board of the State of Calif. v. Construction Laborers Vacation Trust For Southern Calif., et al., 463 U.S. 1, 8, 103 S.Ct. 2840, 2845, 77 L.Ed.2d 420 (1983).

The first issue we need to deal with relates to whether the plaintiffs' cause of action, grounded upon principles of negligence and the construction, maintenance or operation of an allegedly dangerous instrumentality by the appellant, is subject to exclusive federal jurisdiction pursuant to Sections 10(c) and 317 of the Federal Power Act (16 U.S.C. §§ 803(c) and 825p), and, therefore, is more appropriately subject to review in federal District Court and not Common Pleas Court.

> "[T]he question whether a certain state action is preempted by federal law is one of congressional intent. '"The purpose of Congress is the ultimate touchstone."'"

Pilot Life Insurance Co. v. Dedeaux, ____ U.S. ____, ____, 107 S.Ct. 1549, 1551, ____ L.Ed.2d ____ (1987) (Citations omitted).

In making our determination of Congress' intent with regard to the Federal Power Act, we look first to the instructive case of Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1961).

In Pan American, the petitioners sought to prohibit by writ the Superior Court of Delaware from adjudicating a contractual dispute involving the sale of natural gas by the petitioners to Cities Service.

It was the contention of the petitioners that the Natural Gas Act (15 U.S.C. § 717 et seq.) deprived the state court of jurisdiction over the subject matter in dispute, i.e., a contract.

The contract provided that gas produced by the petitioners from a particular field located in Kansas would be

purchased by Cities Service at a fixed price. Thereafter, the Corporation Commission of the State of Kansas fixed a minimum price for the gas removed from the particular field which required Cities Service to pay petitioners a higher rate than set forth in the contract.

Cities Service sued in the Kansas courts to obtain judicial review. Pending resolution of the suit, Cities Service advised the petitioners in a letter that payment of the required fixed (higher) price was being made to avoid any penalties flowing from the Kansas statutes for a violation thereof.

Although the validity of the minimum-rate order by the Kansas Commission was upheld by the State Supreme Court, the United States Supreme Court reversed. As a result, complaints were filed in the Delaware Superior Court by Cities Service seeking recoupment of the overcharges paid to the petitioners under the invalidated Kansas minimum-rate order. The petitioners' request for summary judgment was denied, and what followed was an assault on the jurisdiction of the Superior Court to entertain Cities Service's cause of action in contract. The Delaware Supreme Court sustained the jurisdiction of the Superior Court.

On certiorari to the United States Supreme Court, the actions of the courts below were affirmed despite a provision (§ 22) providing for exclusivity of jurisdiction in the federal courts as to the Natural Gas Act.[2] In fact, despite

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[2]§ 22 of the Natural Gas Act, as is herein relevant, reads:

> The District Courts of the United States * * * shall have exclusive jurisdiction of violations of this [statute] or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty

(Continued on next page)

this seeming preemption of the field by the federal courts as to the Natural Gas Act, the United States Supreme Court cogently stated:

> . . . questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court—on how he casts his action. Since "the party who brings a suit is master to decide what law he will rely upon," The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716, the complaints in the Delaware Superior Court determine the nature of the suits before it. Their operative paragraphs demand recovery on alleged contracts to refund overpayments in the event of a judicial finding that the Kansas minimum-rate order was invalid, or for restitution of the overpayments by which petitioners have allegedly been unjustly enriched under the compulsion of the invalid Kansas order. No right is asserted under the Natural Gas Act.
>
> The suits are thus based upon claims of right arising under state, not federal, law. It is settled doctrine that a case is not cognizable in a federal trial court, in the absence of diversity of citizenship, unless it appears from the face of the complaint that determination of the suit depends upon a question of federal law. See, e.g., Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672, 70 S.Ct. 876, 879, 94 L.Ed. 1194, and cases cited. Apart from diversity jurisdiction, "a

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(Continued)

> created by, or to enjoin any violation of, this [statute] or any rule, regulation, or order thereunder.

The Act of June 21, 1938, c. 556, § 22, 52 Stat. 833, as amended, 15 U.S.C. § 717u.

right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. * * * and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. * * *" Gully v. First National Bank, 299 U.S. 109, 112-113, 57 S.Ct. 96, 97, 81 L.Ed. 70.

For this requirement it is no substitute that the defendant is almost certain to raise a federal defense. See Skelly Oil Co. v. Phillips Petroleum, supra; Gully v. First National Bank, supra, and authorities cited in those cases. Equally immaterial is it that the plaintiff could have elected to proceed on a federal ground. Henry v. A. B. Dick Co., 224 U.S. 1, 14-17, 32 S.Ct. 364, 366-367, 56 L.Ed. 645. If the plaintiff decides not to invoke a federal right, his claim belongs in a state court.

The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas. What was said in Gully v. First National Bank, 299 U.S. at page 116, 57 S.Ct. at page 99, is apposite:

> "We recur to the test announced in Puerto Rico v. Russell & Co. [288 U.S. 476, 53 S.Ct. 447, 77 L.Ed. 903], supra: 'The federal nature of the right to be established is decisive—not the source of the authority to establish it.' Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the

> Constitution of the United States because prohibited thereby. Louisville & Nashville R. Co. v. Mottley [211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126], supra. With no greater reason can it be said to arise thereunder because permitted thereby."

We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive.

Nor does § 22 of the Natural Gas Act help petitioners. "Exclusive jurisdiction" is given the federal courts but it is "exclusive" only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded. This was settled long ago in Pratt v. Paris Gaslight & Coke Co., 168 U.S. 255, 18 S.Ct. 62, 42 L.Ed. 458, a case involving a grant of exclusive jurisdiction to the federal courts in all cases arising under the patent laws. Suit was brought in a state court on a common-law contract claim. The complaint contained no mention of a patent, but the invalidity of certain patents was set up in defense. In response to the argument that this deprived the state courts of jurisdiction, the Court said:

> "Section 711 [the jurisdictional provision] does not deprive the state courts of the power to determine questions arising under the patent laws, but only of assuming jurisdiction of 'cases'arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint or declaration—sets up a right under the patent laws

> as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals." (Emphasis in the original.) 168 U.S. at page 259, 18 S.Ct. at page 64.[2]

366 U.S. at 662-65 & n. 2, 81 S.Ct. at 1307-08 & n. 2.

To start with, our reliance upon Pan American is not unwarranted in light of Congressional debate indicating that: 1) the Natural Gas Act was intended to operate similar to the Federal Power Act; 2) the Natural Gas Act was patterned after the Federal Power Act in the regulatory area; 3) the Natural Gas Act merely contained standard provisions which had been incorporated into other regulatory legislation, including the Federal Power Act; and 4) Congress intended to establish a fairly common rate making and regulatory scheme for interstate sales of natural gas similar to the Federal Power Act. See City of Gainesville v. Florida Power & Light Co., 488 F.Supp. 1258, 1277-78 (S.D. Fla. 1980).

Further, Congress created the Federal Power Commission (now the Federal Energy Regulatory Commission) to carry out the task of establishing federal regulations over most wholesale transactions of electric and gas utilities engaged in interstate commerce. See Federal Power Act of 1935 (Title II of the Public Utility Act of 1935), 49 Stat.

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[2]The foregoing conclusions are not affected by want of explicit limitation to jurisdiction "arising under" the Natural Gas Act. Such limitation is clearly implied, as the authoritative Committee Reports indicate. "This section [referring to § 22] imposes appropriate jurisdiction upon the courts of the United States over cases arising under the act." H.R. Rep. No. 709, 75th Cong., 1st Sess., p.9; S.Rep. No. 1162, 75th Cong., 1st Sess., p.7.

838-863; Natural Gas Act of 1938, 52 Stat. 821; see also Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 378-79, 103 S.Ct. 1905, 1909, 76 L.Ed.2d 1 (1983).

The similarity continues in that the jurisdictional provisions of the Natural Gas Act (cited in relevant part in footnote 1, supra) and the Federal Power Act (16 U.S.C. § 825p)[3] are identical.[4]

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[3] § 825p reads:

> The District Courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

June 10, 1920, c.285, § 317, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 862, and amended June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

Identical language also appears in the jurisdictional proviso of the Securities Exchange Act of 1934 (15 U.S.C. § 78aa), and as to § 78aa's non-preemption status see McMahon Chevrolet, Inc. v. Davis, 392 F.Supp. 322 (S.D. Texas 1975); Cleveland Electric Illuminating Co. v. City of Cleveland, 50 Ohio App. 2d 275, 363 N.E.2d 759 (1976), cert. denied, 434 U.S. 856, 98 S.Ct. 175, 54 L.Ed.2d 127 (1977).

[4] As has been stated in another context, which we find informative

(Continued on next page)

Accordingly, because it is well-established that the Natural Gas Act does not create a cause of action that completely preempts state contract actions, see Pan American, supra; Oliver v. Trunkline Gas Co., 796 F.2d 86, 87 n. 1 (5th Cir. 1986), we see no reason either in law or logic advising against the use of case law interpreting the same to give us insight into the breadth Congress intended to imbue in the "exclusivity" clause of § 825p of the Federal Power Act.

Pan American speaks in terms of "exclusivity" of federal courts vis-a-vis state courts turning upon "the particular claims a suitor makes in a state court—[i.e.,] . . . how he casts his action. Since 'the party who brings a suit is master to decide what law he will rely upon.'" 366 U.S. at 662, 81 S.Ct. at 1307. This is so despite the fact there may be a scheme of federal law in existence upon which a plaintiff's cause of action may be based but is eschewed for state grounds for the pursuit of one's cause of action.[5] This position has been embraced in Airco Alloys Division, Airco, Inc. v. Niagara Mohawk Power Corp., 65 A.D.2d 378, 411 N.Y.S.2d 460 (1978) and Cleveland Electric Illuminating Co. v. City of Cleveland, 50 Ohio App.2d 275, 363 N.E.2d 127 (1977), cert. denied, 434 U.S. 856, 98 S.Ct.

(Continued)

here. the fact that the language is repeated in haec verba in the provisions of the two statutes could "'indicate[] that it does not reflect any considered judgment about what other remedies were . . . available or continue[d] to be available under any particular statute.'" International Paper Co. v. Ouellette, et al., ____ U.S. ____, ____ n. 14, 107 S.Ct. 805, 812 n. 14, ____ L.Ed.2d ____ (1987).

Thus, we are presented with no viable reason counselling against our use of case law interpreting 15 U.S.C. § 717u of the Natural Gas Act to illuminate the manner in which § 825p should be interpreted.

[5]See Note, Federal Preemption, Removal Jurisdiction and the Well-Pleaded Complaint Rule, 51 U.Chi.L.Rev. 634, 664-66 (1984).

175, 54 L.Ed.2d 127 (1977). Both deal with, inter alia, the presentment of contract claims in state courts, despite the assertion of § 825p as a ground for preempting state court jurisdiction involving electric utilities.[6]

Instantly, under the precepts referred to in Pan American and followed in Airco and City of Cleveland, we look to the complaint filed to discern the nature of the plaintiffs' cause of action. We learn therefrom that the plaintiffs ground their complaint on traditional common law notions of negligence and the alleged maintenance of a dangerous instrumentality by the appellant on its property. See Prosser, Law of Torts, §§ 30, 78 (4th Ed. 1975).

No assertion is made by the plaintiffs concerning the violation of any federal law, rule, regulation or order, nor is the cause of action brought to enforce any liability or duty created by or to enjoin any violation of any federal law. See Mississippi Power & Light Co. v. Federal Power Commission, 131 F.2d 148, 150 (5th Cir. 1942); Louisiana Power & Light Co. v. Ackel, 616 F.Supp. 445, 447 (M.D. La. 1985); State of California, etc. v. The Oroville-

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[6]See Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 71 S.Ct. 692, _____ L.Ed.2d _____ (1951) (Petitioner failed to state a federally cognizable cause of action; District Court had no jurisdiction over suit); Mississippi Power & Light Co. v. Federal Power Commission, 131 F.2d 148, 150 (5th Cir. 1942) (No violation of Federal Power Act or order or regulation of Federal Energy Regulatory Commission precluded securement of federal jurisdiction); Allegheny Electric Co-op., Inc. v. Power Authority of State of New York, 630 F.Supp. 1271 (S.D. N.Y. 1986) (§ 825p not applicable because no order of Federal Energy Regulatory Commission was at issue); Louisiana Power & Light Co. v. Ackel, 616 F.Supp. 445, 447 (M.D. La. 1985) (semble) and contrast with Clark v. Gulf Oil Corp., 570 F.2d 1138, 1143 (3rd Cir. 1978) (Plaintiff's alleged injuries flowing from violation of Natural Gas Act); City of Cleveland v. The Cleveland Electric Illuminating Co., 570 F.2d 123, 128 (6th Cir. 1978) (Counterclaim based on order of the Federal Power Act and, thus § 825p was triggered).

Wyandotte Irrigation District, 411 F.Supp. 361, 367 (E.D. Calif. 1975). And, the appellant's citation to 16 U.S.C. § 803(c) is not helpful to its case. It merely makes reference to a licensee (such as the appellant) being "liable for all damages occasioned to the property of others by the construction, maintenance or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor."[7]

There is no mention in § 803(c) of any subject matter which would lead this Court to conclude that a complainant would be foreclosed from instituting suit in state court, on accepted common law principles, solely because of the party-defendant being under the auspices of a federal agency armed to function by federal law.

The logic proffered by the appellant is tenuous at best, and does not need repeated here, except to the extent that uniformity of application of the Federal Power Act and its attendant provisions will not be jeopardized since recourse is always available to parties aggrieved by adverse state-court decisions of federal questions by seeking redress before the United States Supreme Court, if one so desires. See Merrell Dow Pharmaceuticals, Inc. v. Thompson, ____ U.S. ____, 106 S.Ct. 3229, ____ L.Ed.2d ____ (1986); Pan American, supra.

Unlike the Labor Management Relations Act (29 U.S.C. § 185), we do not perceive a congressional intention to explicitly grant federal courts exclusive, preemptive jurisdiction over cases involving suits against utilities regulated by the Federal Energy Regulatory Commission via

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[7]The Act of June 10, 1920, c. 285, § 10, 41 Stat. 1068, as amended, 16 U.S.C. § 803(c).

the Federal Power Act. See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981) (Texas courts had jurisdiction over personal injury action arising under the Outer Continental Shelf Land Act, notwithstanding Congress' explicit grant of exclusive jurisdiction to federal courts over cases arising under OCSLA) and contrast with Metropolitan Life Insurance Co. v. Taylor, ____ U.S. ____, 107 S.Ct. 1542, ____ L.Ed.2d ____ (1987) (State common law claims are not only preempted by Employee Retirement Income Security Act of 1974, but it is also displaced by ERISA's civil enforcement provision to the extent that complaints filed in state courts purporting to plead such state common law causes of action are removable to federal court under 28 U.S.C. § 1441(b)).

In light of the aforesaid, we hold that the state courts of Pennsylvania do have jurisdiction to hear and decide the claims that the plaintiffs have formulated.

It is so ordered. Jurisdiction is relinquished.[8]

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[8]The appellant raises other issues in its brief to us which were not certified for our review, and they do not appear to have been presented to the courts below. Accordingly, we need not address their merits. See Pa.R.App.P. 302(a).

APPENDIX C

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

CIVIL DIVISION

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, a Partnership and as Representative of a Class,
Plaintiffs

v.

WEST PENN POWER COMPANY, a Corporation,
Defendant.

No. 271 November Term, 1985, A.D.

APPEARANCES: C. James Zeszutek, Esquire,
Thorp, Reed & Armstrong;
Gordon F. Harrington, Esquire
Attorneys for the Plaintiffs.

Harold R. Schmidt, Esquire
Richard DiSalle, Esquire,
Rose, Schmidt, Chapman,
Duff & Hasley;
Clarence Crumrine, Esquire
Attorneys for the Defendant.

OPINION AND ORDER OF THE COURT

Rodgers, J.

August 4, 1986.

In November 1985, the plaintiffs filed a class action complaint against the defendant, West Penn Power Company, in the Court of Common Pleas of this county, seeking recovery for property damage caused by the release of waters from the Lake Lynn hydro-electric dam on the Cheat River in West Virginia operated by the defendant in early November 1985. The plaintiffs' complaint stated common law causes of action based upon negligence and upon the operation of a dangerous instrumentality.

The defendant, West Penn Power Company, removed the action to the United States District Court for the Western District of Pennsylvania. The defendant argued that the Federal Court had exclusive jurisdiction, because the plaintiffs' complaint stated a cause of action for damages to property attributable to the maintenance or operation of a power project, licensed under the Federal Power Act, 16 U.S.C. § 791a-828c, and the regulations promulgated thereunder, and that Sections 10 and 317 of the Act, 16 U.S.C. 803c and 825p vested exclusive jurisdiction in the Federal Court over such action.

The plaintiffs, Engle et al., moved to remand the proceeding to this court. Judge Bloch of the United States District Court for the Western District of Pennsylvania in an opinion and order of March 13, 1986, granted the plaintiffs' motion to remand to this court, finding that the plaintiffs' complaint on its face stated only common law actions for negligence and maintaining a dangerous instrumentality, state law claims. Judge Bloch held that subject matter jurisdiction was not conferred upon the Federal District Court by defendant's claim, that the actions being pursued by the plaintiffs arose under federal law, because the federal question must appear on the face of the plaintiffs' complaint, unaided by defendant's answer or petition for

removal. Judge Bloch further held that there was no basis for concluding that the plaintiffs were engaging in artful pleading in order to avoid raising federal issues in their complaint.

By way of dictum, Judge Bloch noted:

> "... The Federal Power Act, unlike the Labor Management Relations Act, is not an area in which the extent of federal primacy is well established and in which it is clear that all state law has been displaced. See Cleveland Electric Illuminating Co. v. City of Cleveland, 50 Ohio App.2d 275, 363 N.E.2d 759 (1976) (concluding that exclusive jurisdiction provision of Federal Power Act does not preclude plaintiff from pursuing state law remedies in state forum);"

Judge Bloch did add in a footnote:

> "In remanding the case, this Court has made no determination on the merits of defendant's contention that plaintiffs' claims are within the exclusive jurisdiction of the federal courts and are, therefore, totally preempted by federal law. Defendant is free to raise these questions in the state court."

However, Judge Bloch did state, in the course of his opinion:

> "A plaintiff is a master of his complaint, and he is free to ignore a federal claim and rely instead on a state ground. Vitarroz v. Borden, Inc., 644 F.2d 960, 964 (2nd Cir. 1981); La Chemise LaCoste v. Alligator Co., 506 F.2d 339 (3d Cir. 1974), cert. denied, 421 U.S. 937 (1975). In the instant case, defendant contends that plaintiffs' state law claims are within the exclusive

jurisdiction of the federal courts. Defendant's contention necessarily rests on the assumption that the Federal Power Act totally preempts and completely displaces plaintiffs' state law claims."

After remand, the defendant, West Penn Power Company, has filed objections on the grounds:

1. This court lacks subject matter jurisdiction of the federal cause of action which is within the exclusive jurisdiction of the federal courts.

2. The complaint fails to state a cause of action for maintenance of a dangerous instrumentality.

3. The plaintiffs have not sufficiently pleaded a description of the class on whose behalf suit is brought.

On the issue of subject matter jurisdiction, this court does not find it necessary to decide if § 803c and 825p, have preempted all state law claims. The defendant's, West Penn Power Company's position is that even if all state law tort claims are not preempted, insofar as the plaintiffs' complaint states a federal cause of action, such cause of action is within the exclusive jurisdiction of the federal court.

The defendant claims that if the plaintiffs' complaint in this court is dismissed, the plaintiffs may still bring a new action in the Federal district court, which may embrace not only the federal cause of action, permitted by the Federal Power Act, but pendent state causes of action, such as asserted in the complaint before this court.

It is, however, the plaintiffs' contention that their complaint does not state a cause of action arising under

federal law, but they are merely exercising their rights referred to in Judge Bloch's opinion:

> "To ignore a federal claim and rely instead on a state ground."

The pertinent provisions of Sections 803c and 825p of the Federal Power Act provide in pertinent part:

> "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

16 U.S.C. § 803c.

> Section 825p provides, in pertinent part,
> The District Courts ... shall have exclusive jurisdiction ... of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or any rule, regulation, or order thereunder.

16 U.S.C. § 825p."

This court finds no allegation in the plaintiffs' complaint to enforce any liability or duty created by Chapter Twelve of the Federal Power Act. Indeed, while the defendant argues that the plaintiffs' claim is bottomed on the provisions of the Federal Power Act, it also argues, quite correctly, that the plaintiffs' complaint does not claim any violation of the federal law or regulations governing the license granted to the defendant corporation by the Federal Power Commission on October 21, 1970.

The legislative history of the Federal Water Power Act of 1920 is disucssed in First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 at 174, 90

L.Ed. 1143 at 1155 (1946), and some of the legislative history of the Federal Power Act of 1935 is discussed in the case of the City of Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258 (S.D.Fla.1980) at 1271. It is apparent from the discussion that the Federal Water Power Act of 1920 was concerned with the development of water power in the United States on navigable waters without intruding too far into the regulatory power of the states, (16 U.S.C. § 821, "State laws and water rights unaffected"), and the legislative history of the Federal Power Act of 1935 discussed in Gainesville indicates the debates centered around provisions of the 1935 amendments designed to eliminate or regulate public utility holding companies, although the Act also granted exclusive jurisdiction to the Federal Power Commission to regulate interstate sales of wholesale power. Nantahala Power and Light Company, et al. v. Attorney General of North Carolina, et al., 54 U.S.L.W. 4676, 4680 (6-17-86). There is no indication in the legislative history that tort claims for money damages, arising out of the maintenance or operation of hydro-electric dams, played any part in the passage of the Federal Acts either in 1920 or 1935 or subsequent amendments.

Indeed, it has been stated that the main purpose of the Federal Power Act is to protect consumers against excessive prices. Pennsylvania Water and Power Company v. Federal Power Commission, 343 U.S. 414, 96 L.Ed. 1047 (1952).

It is apparent, therefore, that the legislative history is not conclusive in this case.

In the case of the United States, Petitioner, v. Charlotte James, et al., 54 U.S.L.W. 5030, (6-24-86) at 5032,

5033, Justice Powell speaking for the United States Supreme Court said this:

> "The starting point in statutory interpretation is 'the language of the Statute itself.' Blue Chip Stamps v. Manor Drug Store, 421 U.S. 723, 756 (1975) (POWELL, J., concurring). '[W]e assume that the legislative purpose is expressed by the ordinary meaning of the words used.' American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982).
>
> . . .
>
> We have repeatedly recognized that '[w]hen . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except "in 'rare and exceptional circumstances'" Rubin v. United States 449 U.S. 424, 430 (1981) (citations omitted). In the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.' Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Despite respondents' contentions and the reasoning of the Court of Appeals, we do not find that the legislative history of the statute justifies departure from the plain words of the statute. Indeed, on balance we think the legislative history of the Flood Control Act of 1928 reinforces the plain language of the immunity provision in § 702c."

Section 825p of Title 16 clearly states that the exclusive jurisdiction of the district court applies only to "all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or any rule, regulation, or order thereunder." 16 U.S.C. § 825p.

The plaintiffs here have not brought any suit or action at law to enforce any liability or duty created by the Federal Power Act or by any rule or regulation issued by the Federal Power Commission, under the provisions of the Federal Power Act. Thus, assuming Section 803c does create a federal cause of action, these plaintiffs are not seeking money damages under the provisions of the Federal Power Act, but seeking damages under well recognized common law remedies. The plain words of the Federal Power Act applies, only, to federal causes of actions, and not to state causes of actions brought to enforce common law remedies.

The defendant, while asserting the existence of a federal cause of action, carefully avoids spelling out the elements of such a cause of action. Of course, if those elements are defined simply as liability for damages to the property of others, caused by the maintenance of any hydro-electric dam by a licensee, under the Federal Act, Seaboard Air Line R.R.Co. v. County of Crisp of Georgia, 280 F.2d 873 (5th Cir.1960), such elements are included also in the statement of state common law remedies, although the additional elements of negligence and an abnormally dangerous activity must also be added to the statement of the common law remedies, which the plaintiffs here have attempted to do.

The plaintiffs' complaint in this case asserts rights that existed long before the Federal Water Power Act of 1920. See annotation, Liability for Overflow of Water Confined or Diverted for Public Water Power Purposes, 91 A.L.R.3rd 1065. See also Kunz v. Utah Power and Light Company, 526 F.2nd 500 (9th Cir.1975). The federal courts have not always agreed that Section 803c of the Federal Power Act creates a cause of action for damages.

Cf. Gainesville v. Florida Power and Light Company, supra, with Key Sales Company v. South Carolina Elecric and Gas Company, 290 F.Supp. 8, at 23 (D.S.C.1968), aff'd 422 F.2nd 389 (4th Cir.1970).

However, in the instant case, the plaintiffs are not claiming that Section 803c and regulations and licenses issued thereunder do not create a federal cause of action. The plaintiffs properly claim, however, that they are not bound to assert such a federal cause of action, and may still rely upon their common law remedies. This court finds that is all the plaintiffs have done, and that no federal cause of action has been set forth.

The defendant's preliminary objection that this court, therefore, lacks subject matter jurisdiction is dismissed.

The defendant has demurred to Count II of plaintiffs' complaint on the ground that under Pennsylvania Law the defendant's dam is not a dangerous activity as set forth in the Restatement, Torts 2d, § 519. The court has examined the allegations of Count II and finds the plaintiffs have averred only that the defendant is the operator of a hydro-electric power dam, whose lake is about 14 miles in circumference and holds 195 billion cubic feet of water. The plaintiffs then go on to aver that the defendant failed to train its operating personnel in the safe operation of the dam during flood stages, and allowed the water level in the lake to rise to an ureasonably high level. This court finds that Count II of the plaintiffs' complaint does not aver that the risks in maintaining such a hydro-electric dam could not be eliminated by the exercise of reasonable care, nor that such activity is not a matter of common usage, nor that it was inappropriate at the place where it was carried on, nor the extent that its value to the community is outweighed by its dangerous attributes, all of which are factors

set forth in Section 520, Restatement, Torts 2d. Accordingly, the court will sustain the defendant's demurrer to Count II of the plaintiffs' complaint, but allow the plaintiffs twenty (20) days to file an amended complaint.

Finally, the defendant claims that it is entitled to a more definitive statement defining the class which plaintiffs purport to represent. This preliminary objection raises issues of fact which may be more appropriately considered after discovery and hearing on the motion for certification of the class action. Pa.R.C.P. 1705, 1707.

ORDER OF THE COURT

AND NOW, this 4th day of August, 1986, the preliminary objection of the defendant, West Penn Power Company, in the matter of jurisdiction of this court is dismissed with prejudice.

The defendant's demurrer to Count II that the plaintiffs have not sufficiently averred the maintenance of the hydro-electric dam is a dangerous instrumentality is sustained, and the plaintiffs are granted twenty (20) days to amend their complaint in this respect.

The defendant's preliminary objection that the description of the class in the plaintiffs' complaint is vague and indefinite is dismissed without prejudice.

SAMUEL L. RODGERS

Samuel L. Rodgers, J.

C-11

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, a Partnership and as Representative of a Class
Plaintiffs,

vs.

WEST PENN POWER COMPANY, a Corporation,
Defendant.

Class Action
No. 271 Nov. Term 1985 AD

ORDER

AND NOW, to-wit this 18th day of August, 1986, this Court being satisfied that its Order of August 4, 1986 dismissing defendant's preliminary objection on the question of subject matter jurisdiction involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal to the Superior Court of Pennsylvania from the Order would materially advance the ultimate termination of the matter, it is hereby ORDERED, ADJUDGED and DECREED that defendant's Petition to Amend Order to Certify Controlling Question of Law and to Stay Proceedings Pending Appeal is granted and said Order is amended to include the statement as follows: The dismissal of defendant's preliminary objection on the question of subject matter jurisdiction involves a controlling question of law as to which there is a substantial ground for difference of opinion, and

an immediate appeal to the Superior Court of Pennsylvania from the Order would materially advance the ultimate termination of the matter. This action shall proceed in accordance with this Court's Orders previously entered in the above-styled cause and as may further be agreed upon by the parties or order of court.

BY THE COURT:

SAMUEL L. RODGERS

Samuel L. Rodgers, J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, a partnership, and as representative of a class,
Plaintiffs,

vs.

WEST PENN POWER COMPANY, a corporation,
Defendant.

Civil Action No. 85-2924

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs bring this suit against defendant West Penn Power Company to recover for property damage allegedly caused by flooding that was the result of defendant having released all of the water in a hydroelectric dam. The complaint, which was originally filed in the Court of Common Pleas of Washington County, Pennsylvania, alleges two state law claims for negligence and operating a dangerous instrumentality. Defendant filed a petition for removal of the action to this Court pursuant to 28 U.S.C. § 1441, which confers federal removal jurisdiction over any civil action the district court would have had jurisdiction over had the case been brought there originally. In its petition, defendant asserts that this Court has original jurisdiction

under 28 U.S.C. § 1331,[1] as well as exclusive jurisdiction under the Federal Power Act, 16 U.S.C. §§ 803(c), 825p,[2] because plaintiffs' complaint alleges that the property damage resulted from defendant's maintenance and operation of the hydroelectric dam.

Presently before this Court is plaintiffs' motion to remand this case to the state court. For the reasons that follow, plaintiffs' motion is granted.

Initially, the Court notes that defendant contends that the Court of Common Pleas of Washington County did not have jurisdiction over plaintiffs' state law claims because federal courts, under the Federal Power Act, have exclusive jurisdiction over such claims. Noting that the removal jurisdiction of federal courts is derivative in nature, defendant argues that this Court did not acquire any jurisdiction on removal and should, therefore, dismiss the case. It is well established that if, after removal, a federal court determines that the removed claim is an exclusive federal claim, that it should dismiss the claim because of the derivative nature of removal jurisdiction. See Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n. 27 (1983). However, before it

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[1]The statute provides "The district courts shall have original jurisdiction of all civil actions under the Constitution, laws or treaties of the United States."

[2]Section 803(c) of the Federal Power Act provides in relevant part: "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor." 16 U.S.C. § 803(c). The pertinent portion of § 825p provides "The District Courts of the United States, . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by . . . this chapter or any rule, regulation, or order thereunder." 16 U.S.C. § 825p.

reaches the question of whether the claim is one within the exclusive jurisdiction of the federal courts, the Court must determine if the claim was properly removed. See Powers v. South Central United Food & Commercial Workers Union and Employers Health & Welfare Trust, 719 F.2d 760, 762 (5th Cir. 1982) (determination that case was improperly removed from state court because claims did not arise under federal law precluded the need to examine the district court's determination that plaintiff's claims were within the exclusive jurisdiction of federal courts).

Therefore, the question for this Court to determine is whether this case was properly removed from the state court.

The burden of establishing federal jurisdiction falls on the party who invokes the removal statute. Salveson v. Western States Bankcard Association, 731 F.2d 1423, 1426 (9th Cir. 1984). Moreover, the removal statute is to be strictly construed against that party. Id. The Supreme Court has interpreted the removal statute as reflecting a congressional policy of severe abridgement of the right to remove a state action to federal court. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941). In accordance with this restrictive view against removal, the removal statute is to be strictly construed against removal and in favor of remand. Id.; Carpenters Southern California Administration Corp. v. Majestic Housing, 743 F.2d 1341, 1343 (9th Cir. 1984).

It is clear that plaintiffs' claims for negligence and maintaining a dangerous instrumentality are state law claims. In its removal petition, defendant contends that plaintiffs' claims arise under federal law because they are, pursuant to the Federal Power Act, claims for property damage resulting from the maintenance and operation of a

federally-licensed hydroelectric dam. It is well settled that a case arises under federal law within the meaning of 28 U.S.C. § 1331 only if the federal question appears in the face of plaintiffs' complaint unaided by the answer or petition for removal. Taylor v. Anderson, 234 U.S. 74, 75-76 (1914); Westmoreland Hospital Association v. Blue Cross of Western Pennsylvania, 605 F.2d 119, 122 (3d Cir. 1979), cert. denied, 444 U.S. 1077 (1980); see Gully v. First National in Meridian, 299 U.S. 109, 112-13 (1936); Louisville and National R.R. Co. v. Martley, 211 U.S. 149 (1908). Under the "well-pleaded complaint" rule, a defendant "may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." Franchise Tax Board, 463 U.S. at 10. Thus, a defendant cannot remove a state law claim from state to federal court even if his defense is based entirely on federal law. Id.; see Northeast Department ILGWU v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147 (3d Cir. 1985).

A plaintiff is a master of his complaint, and he is free to ignore a federal claim and rely instead on a state ground. Vitarroz v. Borden, Inc.,644 F.2d 960, 964 (2nd Cir. 1981); La Chemise LaCoste v. Alligator Co., 506 F.2d 339 (3d Cir. 1974), cert. denied, 421 U.S. 937 (1975). In the instant case, defendant contends that plaintiffs' state law claims are within the exclusive jurisdiction of the federal courts. Defendant's contention necessarily rests on the assumption that the Federal Power Act totally preempts and completely displaces plaintiffs' state law claims.

When a plaintiff presents a state law claim and a defendant counters by arguing that federal law preempts the state law on which plaintiff relies, the federal claim

appears by way of defense and does not provide an adequate basis for removal. Franchise Tax Board, 463 U.S. at 12. This is true regardless of whether the preemption defense is anticipated or actually articulated. Trent Realty Associates v. First Federal Savings and Loan Association, 657 F.2d 29, 35 (3d Cir. 1981).

The analysis of the Supreme Court is Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961), is particularly relevant to the instant case. In Pan American, the plaintiff had asserted a state law contract claim in a dispute over prices of natural gas and the defendant had challenged the jurisdiction of the state court on the grounds that the Natural Gas Act preempted state law and provided federal courts with exclusive jurisdiction over plaintiff's claims. Although in an earlier decision it had decided the preemptive effect of the Natural Gas Act, the Supreme Court found that federal courts lacked jurisdiction over the state contract claims because the Natural Gas Act arose only as a defense to the claims. Id. at 662. The Court explained that:

> [Q]uestions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate subsequent issues of federal law. The answers depend upon the particular claims a suitor makes in a state court—on how he casts his action. Since "the party who brings a suit is master to decide what law he will rely upon," . . . the complaints in the [state court] determine the nature of the suits before it.

Id.

Under the well-pleaded complaint rule, subject matter jurisdiction is not conferred upon the Court by invoking a federal defense. In the instant case, plaintiffs have chosen

to pursue state law claims in state court. Defendant's contention that plaintiffs' claims are within the exclusive jurisdiction of federal courts and, therefore, are totally preempted by the Federal Power Act, arise only by way of defense and do not provide a basis for removal.

An independent corollary of the well-pleaded complaint doctrine provides that a plantiff may not defeat removal by fraudulent means or by "artfully" failing to plead essential federal issues in the complaint. Franchise Tax Board, 463 U.S. at 22. In Salveson, 731 F.2d at 1427, the Ninth Circuit notes that "[t]he artful pleading doctrine is to be invoked only in exceptional circumstances as it raises difficult issues of state and federal relationships and often yields unsatisfactory results." Plaintiffs are free to ignore a federal claim and rely instead on a state ground. La Chemise LaCoste, 506 F.2d at 345-46. The Third Circuit recently noted that an expansive application of the artful pleading doctrine would effectively abrogate the rule that a plaintiff is master of his complaint. United Jersey Banks v. Parell, No. 85-5525, slip op. at 16 (February 14, 1986).

In United Jersey Banks, plaintiffs sought to prevent the merger of two nationally chartered banks by challenging the merger under two New Jersey statutes. In doing so, plaintiffs specifically declined to challenge the merger under federal statutes. After the defendants had removed the action to the United States District Court of New Jersey, the district court denied plaintiffs' motion to remand on the grounds that removal based on federal jurisdiction was proper because plaintiffs' state law claims were essentially federal claims. Id. at 9-10. The Third Circuit, noting the district court had applied the artful pleading doctrine, concluded that the district court did not have

jurisdiction and improperly denied plaintiffs' motion to remand. Id. at 20-21. In reaching its conclusion, the Third Circuit stated that in general federal jurisdiction will not be found when the complaint states a prima facie case under state law. Id. at 16. In addition, the Third Circuit criticized the district court for relying on the "exclusivity" of federal law to displace the state law claims because the practical effect of its holding was to rely on federal preemption. Id. at 17. Citing to the Supreme Court's decision in Pan American Petroleum Corp., the Third Circuit stated that even when the preemptive effect of federal legislation has already been established, state claims do not lose their state character and arise under federal law because it is "common knowledge that there exists a scheme of federal regulation." Id. at 17-18 (quoting Pan American Petroleum Corp., 366 U.S. at 663). The Third Circuit explained that courts that have applied the artful pleading doctrine have done so primarily in the context of § 301 of the Labor Management Relations Act because the extent of federal primacy is well established and state law is completely displaced. Id. at 16.

In the instant case, the Court can find no basis for concluding that plaintiffs had a "fraudulent purpose" in basing their action completely on state law claims. Plaintiffs' complaint clearly states prima facie claims of state law. Furthermore, the Federal Power Act, unlike the Labor Management Relations Act, is not an area in which the extent of federal primacy is well established and in which it is clear that all state law has been displaced. See Cleveland Electric Illuminating Co. v. City of Cleveland, 50 Ohio App.2d 275, 363 N.E.2d 759 (1976) (concluding that exclusive jurisdiction provision of Federal Power Act does not preclude plaintiff from pursing state law remedies in state

forum); Airco Alloys Division, Arco, Inc. v. Niagara Mohawk Power Corp., 65 A.2d 378, 411 N.Y.S.2d 460 (1978) (claim asserting traditional contract rights in seeking ordinary contract relief provided proper jurisdiction for state court regardless of exclusive jurisdiction provision of Federal Power Act). Plaintiffs' state law claims do not lose their character because of the existence of federal regulation under the Federal Power Act.

Plaintiffs have availed themselves of the state forum in relief to which they assert that they are entitled. The Court can find no basis for applying the artful pleading doctrine and recharacterizing plaintiffs' state law claims as federal claims. Plaintiffs' motion to remand, therefore, is granted and this case is remanded to the Court of Common Pleas of Washington County, Pennsylvania, pursuant to 28 U.S.C. § 1447.[3]

An appropriate Order will be issued.

Dated: March 13, 1986

/s/ ALAN N. BLOCH
United States District Judge

cc: Counsel of record.

[3]In remanding the case, this Court has made no determination on the merits of defendant's contention that plaintiffs' claims are within the exclusive jurisdiction of the federal courts and are, therefore, totally preempted by federal law. Defendant is free to raise these questions in the state court.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, a partnership and as representative of a class,
Plaintiffs,

vs.

WEST PENN POWER COMPANY, a corporation,
Defendant.

Civil Action No. 85-2924

ORDER

AND NOW, this 13th day of March, 1986, upon consideration of Plaintiffs' Motion to Remand filed in the above captioned matter on January 7, 1986,

IT IS HEREBY ORDERED that said Motion is GRANTED. The Clerk of Court is hereby directed to REMAND this case forthwith to the Court of Common Pleas of Washington County, Pennsylvania.

..../s/ ALAN N. BLOCH.....
United States District Judge

cc: C. James Zeszutek and Diana L. Reed, Esquires
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Gordon F. Harrington, Esquire
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Harold R. Schmidt and Richard DiSalle, Esquires
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Clarence A. Crumrine, Esquire
800 Washington Trust Bldg., Washington, PA 15301.

APPENDIX E

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA CIVIL DIVISION

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, a Partnership, and as Representative of a Class,
Plaintiffs,

v.

WEST PENN POWER COMPANY, a Corporation,
Defendant.

No. 271 Nov. Term, 1985, A.D.

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in this complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

. YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, CONTACT:

Lawyer Referral Service
523 Washington Trust Building
Washington, PA 15301
(412) 225-6710

IF YOU CANNOT AFFORD A LAWYER, CONTACT:

Southwestern Pennsylvania Legal Aid Society
10 West Cherry Avenue
Washington, PA 15301
(412) 225-6170

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, a Partnership, and as Representative of a Class,
Plaintiffs,

v.

WEST PENN POWER COMPANY, a Corporation,
Defendant.

Civil Division
No. _____
Issue No. _____
Class Action Complaint
Code: _____-
Civil Action Filed on Behalf of Plaintiffs

Counsel of Record for This Party:

C. JAMES ZESZUTEK
Pa. I.D. No. 22071

DIANA L. REED
Pa. I.D. No. 39635

THORP, REED & ARMSTRONG
Firm No. 282
One Riverfront Center
Pittsburgh, PA 15222
412/394-2565

GORDON F. HARRINGTON
Pa. I.D. No. 05462

GREENLEE, DERRICO, POSA, HARRINGTON AND RODGERS
325 Washington Trust Building
Washington, PA 15301
412/344-9400

CLASS ACTION COMPLAINT

NOW COME the plaintiffs, JOHN H. ENGLE, WILLIAM R. ENGLE and WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, a partnership, by their attorneys, C. James Zeszutek, Diana L. Reed, and Thorp, Reed & Armstrong, and Gordon F. Harrington and Greenlee, Derrico, Posa, Harrington and Rodgers, and in support of their Class Action Complaint against defendant, West Penn Power Company, state as follows:

CLASS ACTION ALLEGATIONS

1. Plaintiffs, John H. Engle, William R. Engle, William C. Engle, t/d/b/a Engle's Holiday Harbor (hereinafter collectively referred to as "the Engles"), are citizens and residents of Millsboro, Washington County, Pennsylvania, are registered to do business under the laws of the Commonwealth of Pennsylvania, and have their principal place of business at Millsboro, Washington County, Pennsylvania.

2. Defendant, West Penn Power Company (hereinafter "West Penn"), is a corporation existing under and by virtue of the laws of the Commonwealth of Pennsylvania with its corporate headquarters at Cabin Hill, Greensburg, Pennsylvania.

3. At all times material to the within complaint, plaintiffs were and continue to be in the boating, boat storage and marina business.

4. At all times material to the within complaint, defendant was and continues to be in the business of generating and supplying electrical power.

5. Defendant West Penn also operates a hydroelectric dam for the purpose of producing electricity, which dam is located at Cheat Lake a/k/a Lake Lynn (hereinafter referred to as "the Lake").

6. The Engles are representatives of a class in excess of fifty (50) members which is comprised of owners of land and other property, each of whom has suffered damage to his property by virtue of defendant's conduct as hereinafter alleged.

7. The present class, in excess of fifty (50) members, is so numerous that joinder of all members is impracticable.

8. Questions of law or fact exist which are common to the class in that plaintiffs and all class members are all owners of land and other property each of whom has suffered damages due to defendant's conduct as hereinafter alleged.

9. The claims of the Engles are typical of the claims of the class in that plaintiffs have suffered extensive damage to land and other property due to defendant's conduct as hereinafter alleged.

10. The Engles will fairly and adequately assert and protect the interests of the class:

(a) Plaintiffs have retained C. James Zeszutek, Diana L. Reed and Thorp, Reed & Armstrong and Gordon F. Harrington and Greenlee, Derrico, Posa, Harrington and Rodgers as legal counsel for the plaintiff class;

(b) The Engles have no conflict of interest in the maintenance of this class action;

(c) The Engles have adequate financial resources to assure that the interests of the class will not be harmed.

11. A class action is a fair and efficient method of adjudicating this controversy in that:

(a) Common questions of law or fact predominate over any question affecting individual members since each member of the class of plaintiffs suffered damage to land and other property due to defendant's conduct as hereinafter alleged;

(b) The size of the class is in excess of fifty (50) members and is suitable for the administration of this suit as a class action;

(c) The prosecution of separate actions by individual members of the class would create a risk of:

(i) inconsistent or varying adjudications with respect to individual members of the class;

(ii) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of other property owners not parties to this adjudication, or substantially impede or impair their ability to protect their interests.

12. This forum is appropriate for the litigation of the claims of the entire class because the majority of the class members reside in Washington County, Pennsylvania, and significant damages have been incurred by these class members.

13. In view of the complexities of the issues and the expenses of this litigation, the separate claims of some of the individual class members are insufficient in amount to support separate actions and in particular because of the

economies of scale that can be achieved by litigating these claims as a class action.

14. The amount likely to be recovered by individual class members is not so small in relation to the expense and administration of this action so as not to justify a class action.

COUNT I

15. Plaintiffs repeat and reallege each and every averment of paragraphs 1 through 14, inclusive, as if fully set forth at length.

16. Defendant West Penn is the operator of a hydro-electric power dam.

17. Defendant West Penn, as operator of the aforesaid hydro-electric dam, is responsible for maintenance of the water level in the dam, release of water from the dam, and the repair and maintenance of the dam.

18. During the period of early November, 1985, Western Pennsylvania had substantial amounts of rainfall which resulted in the accumulation of significant volumes of water and flooding of many areas along the Monongahela River in Washington County, Pennsylvania and other contiguous counties.

19. The rainfall and water accumulation resulted in the flooding of many areas abutting lakes and rivers in Western Pennsylvania.

20. Defendant West Penn, in the normal course of its operation of the hydro-electric dam, monitors the water level of the dam, and is responsible for the orderly and safe release of water from the dam's lake in order to maintain a safe water level.

21. Defendant West Penn, in the normal course of its operations, regularly releases waters from the dam's lake to maintain water level.

22. On or about November 5, 1985, the amount of rainfall and water accumulation caused the water level of the aforesaid dam's lake to rise very quickly.

23. Prior to November 5, 1985, defendant West Penn failed to develop or implement plans for controlling the rapid rise of water level in the dam's lake.

24. On or about November 5, 1985, defendant West Penn, without notice and without regard to the safety of individuals and property along the Monongahela River, opened gates of the dam to allow the release of water from the dam's lake.

25. The release of water by defendant West Pennn on or about November 5, 1985 resulted in the release of all the water of the dam's lake causing the entire dam to drain.

26. The sudden, indiscriminate and imprudent release of all waters of the dam's lake by defendant West Penn on or about November 5, 1985 caused the water level of the Monongahela River and connecting streams, tributaries and waterways to rise an additional ten (10) feet, resulting in the cresting of flood waters at least twenty (20) feet over flood stage.

27. The rise in water of at least an additional ten (10) feet was the direct and proximate result of defendant's negligence in

(a) failing to develop or implement a plan for the orderly control of waters of the dam's lake during periods of heavy rainfall and water accumulation;

(b) failing to develop or implement a plan for the release of water and the opening of gates in an orderly and controlled fashion so as to minimize additional flooding and damage;

(c) opening all 140 gates of the dam; and,

(d) allowing the release of all waters in the dam's lake.

28. As a direct and proximate result of defendant's negligence, plaintiffs and the class named herein of owners of land and other property along the Monongahela River and adjacent streams, tributaries and waterways suffered damage to their land and other property.

WHEREFORE, plaintiffs, as representatives of the above-named class, claim damages of defendant West Penn in the amount in excess of TEN THOUSAND DOLLARS ($10,000.00) with interest and costs and such further relief as this Honorable Court deems appropriate.

COUNT II

29. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 28 above as if the same were set forth fully herein at length.

30. Defendant was, at all times relevant to this Complaint is, the operator of a hydro-electric power dam.

31. Said dam's lake is approximately 14 miles in circumference and holds over One Hundred Ninety-Five Billion (195,000,000,000) cubic feet of water.

32. Defendant West Penn has the duty to ensure that the dam, a dangerous instrumentality, is operated safely, with due regard to the proper water levels and the safe, prudent and careful release of waters from the dam's lake.

33. It is the further duty of defendant West Penn to train its operating personnel in the safe operation of said dam, a dangerous instrumentality, with due regard to the maintenance of safe water levels and the orderly and prudent release of waters from the dam's lake, and to maintain the dam in a reasonably safe condition.

34. Defendant failed to train its operating personnel in the safe operation of said dam during flood stages, which resulted in its maintenance of a dangerous instrumentality in a highly dangerous condition during periods of heavy rainfall and water accumulation.

35. Defendant, disregarding its duty in properly maintaining the dam's lake, allowed the water level to rise to an unreasonably high level in the dam causing a serious condition affecting the dangerous instrumentality.

36. Defendant, on or about November 5, 1985, in the operation of a dangerous instrumentality, caused all gates of the dam to be opened and released dangerous amounts of water which had accumulated in the dam's lake.

37. Defendant, as a direct and proximate result of conduct relating to the maintenance of said dam, a dangerous instrumentality, caused waters to be released which caused a rise in the flood water level by at least an additional ten (10) feet above the then existing flood crest.

38. As a direct and proximate result of defendant's maintenance of a dangerous instrumentality, plaintiffs and the members of the above-named class suffered damage to their land and property.

WHEREFORE, plaintiffs, as representatives of the above-named class, claim damages of defendant West Penn in the amount in excess of TEN THOUSAND DOLLARS ($10,000.00) with interest and costs and such further relief as this Honorable Court deems appropriate.

Respectfully submitted,

Dated:
November 21, 1985

/s/ C. JAMES ZESZUTEK
C. James Zeszutek

/s/ DIANA L. REED
Diana L. Reed

THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222
412/394-2565

/s/ GORDON F. HARRINGTON
Gordon F. Harrington

GREENLEE, DERRICO, POSA,
HARRINGTON AND RODGERS
325 Washington Trust Building
Washington, PA 15301
412/344-9400

Attorneys for Plaintiffs
and the Class Members

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF WASHINGTON } SS:

Before me, the undersigned authority, a Notary Public in and for the Commonwealth and County aforesaid, person ..lly appeared WILLIAM C. ENGLE, who, being by me first duly sworn according to law, deposes and says that the averments contained in the foregoing CLASS ACTION COMPLAINT are true and correct to the best of his knowlege, information and belief, and that those averments of which he does not have personal knowledge he believes to be true and correct based upon the knowledge and information of others.

..../s/ WILLIAM C. ENGLE.....
William C. Engle

Sworn to and Subscribed
before me this 21st day
of November, 1985.

...../s/ REBECCA S. HERRON.....
Notary Public

MY COMMISSION EXPIRES:

REBECCA S. HERRON
WASHINGTON, WASHINGTON COUNTY
MY COMMISSION EXPIRES APRIL 11, 1988
Member Pennsylvania Association of Notaries

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF WASHINGTON } SS:

Before me, the undersigned authority, a Notary Public in and for the Commonwealth and County aforesaid, personally appeared JOHN H. ENGLE, who, being by me first duly sworn according to law, deposes and says that the averments contained in the foregoing CLASS ACTION COMPLAINT are true and correct to the best of his knowlege, information and belief, and that those averments of which he does not have personal knowledge he believes to be true and correct based upon the knowledge and information of others.

/s/ JOHN H. ENGLE
John H. Engle

Sworn to and Subscribed
before me this 21st day
of November, 1985.

/s/ REBECCA S. HERRON
Notary Public

MY COMMISSION EXPIRES:

REBECCA S. HERRON
WASHINGTON, WASHINGTON COUNTY
MY COMMISSION EXPIRES APRIL 11, 1988
Member Pennsylvania Association of Notaries

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AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF WASHINGTON } SS:

Before me, the undersigned authority, a Notary Public in and for the Commonwealth and County aforesaid, personally appeared WILLIAM R. ENGLE ENGLE, who, being by me first duly sworn according to law, deposes and says that the averments contained in the foregoing CLASS ACTION COMPLAINT are true and correct to the best of his knowlege, information and belief, and that those averments of which he does not have personal knowledge he believes to be true and correct based upon the knowledge and information of others.

..../s/ WILLIAM R. ENGLE.....
William R. Engle

Sworn to and Subscribed
before me this 21st day
of November, 1985.

...../s/ REBECCA S. HERRON.....
Notary Public

MY COMMISSION EXPIRES:

REBECCA S. HERRON
WASHINGTON, WASHINGTON COUNTY
MY COMMISSION EXPIRES APRIL 11, 1988
Member Pennsylvania Association of Notaries

APPENDIX F

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, a Partnership, and as Representative of a Class,
Plaintiffs,

vs.

WEST PENN POWER COMPANY, a corporation,
Defendant.

CIVIL DIVISION
No. 271 Nov. Term 1985 A.D.
Issue No.
Code:
FIRST AMENDED COMPLAINT
Filed on Behalf of Plaintiffs

Counsel of Record for This Party:

C. JAMES ZESZUTEK
Pa. I.D. No. 22071

MICHAEL R. BUCCI, JR.
Pa. I.D. No. 33394

DIANA L. REED
Pa. I.D. No. 39635

THORP, REED & ARMSTRONG
Firm No. 282
One Riverfront Center
Pittsburgh, PA 15222
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GORDON F. HARRINGTON
Pa. I.D. No. 05462

GREENLEE, DERRICO, POSA, HARRINGTON AND RODGERS
325 Washington Trust Building
Washington, PA 15301
412/344-9400

FIRST AMENDED COMPLAINT

AND NOW COMES plaintiffs, JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, a Partnership, and as Representative of a Class, by their counsel, Thorp, Reed & Armstrong, and in support of their First Amended Complaint against defendant, West Penn Power Company, state as follows:

1. - 28. Each and every allegation contained in Paragraph 1 through 28 of Plaintiff's Class Action Complaint are repeated and realleged as if the same were set forth fully herein.

COUNT II

29. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 28 above as if the same were set forth fully herein.

30. Defendant was, at all times relevant to this Complaint, the operator of a hydro-electric power dam.

31. Said dam's lake is approximately 14 miles in circumference and holds over One Hundred Nine-Five Billion (195,000,000,000) cubic feet of water.

32. The dam operated by defendant is located on the Monongahela River above-stream of plaintiffs' land and other property.

33. The containment of the dam's lake, holding 195,000,000,000 cubic feet of water, is a non-natural use of land and water which involves a high degree of risk.

34. The release of waters from the dam's lake is a necessary part of defendant's operation of the dam and is a

non-natural use of land and water which involves a high degree of risk.

35. The inherent risk in containing 195,000,000,000 cubic feet of water cannot be eliminated by the exercise of reasonable care.

36. The inherent risk of releasing water from a dam lake containing 195,000,000,000 cubic feet of water cannot be eliminated by the exercise of reasonable care.

37. The operation of a hydro-electric power dam is not an activity of common usage and is an unsual and abnormal activity.

38. The release of water from the dam lake containing 195,000,000,000 cubic feet of water is not an activity of common usage and is an unusual and abnormal activity.

39. The operation of a hydro-electric power dam at a location above-stream of residential and commercial structures and activity is inappropriate because of the inherent risk involved in its operation.

40. The release of waters from the dam's lake located above-stream of residential and commercial structures and activity is inappropriate because of the inherent risk involved in such releases.

41. The benefits of the hydro-electric power dam at its location above-stream of residential and commercial property and activity is outweighed by its inherently dangerous attributes.

42. As a direct result of defendant's conduct of the abnormally dangerous activity described herein in operating the dam, plaintiffs and the members of the above-

named class suffered damages to their land and property in excess of Ten Thousand Dollars ($10,000.00).

WHEREFORE, plaintiffs, as representatives of the above-named class, claim damages of defendant West Penn Power an amount in excess of TEN THOUSAND DOLLARS ($10,000.00), together with interest and costs and such other relief as this Honorable Court deems appropriate.

Respectfully submitted,

By . . . /s/ C. JAMES ZESZUTEK . . . . .
C. James Zeszutek

By . . /s/ MICHAEL R. BUCCI, JR. . . . .
Michael R. Bucci, Jr.

By . . . . . /s/ DIANA L. REED . . . . . .
Diana L. Reed

THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222
412/394-2565

By . . /s/ GORDON F. HARRINGTON . . . .
Gordon F. Harrington

GREENLEE, DERRICO, POSA,
HARRINGTON AND RODGERS
325 Washington Trust Building
Washington, PA 15301
412/344-9400

Dated:
September 9, 1986

Attorneys for Plaintiffs
and the Class Members

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AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF WASHINGTON } SS:

Before me, the undersigned authority, a Notary Public in and for the Commonwealth and County aforesaid, personally appeared JOHN H. ENGLE, who, being by me first duly sworn according to law, deposes and says that the averments contained in the foregoing FIRST AMENDED COMPLAINT are true and correct to the best of his knowledge, information and belief, and that those averments of which he does not have personal knowledge he believes to be true and correct based upon the knowledge and information of others.

/s/ JOHN H. ENGLE
John H. Engle

Sworn to and Subscribed
before me this 9th day
of September, 1986.

/s/ CYNTHIA D. SNYDER
Notary Public

CYNTHIA D. SNYDER
WASHINGTON, WASHINGTON COUNTY
MY COMMISSION EXPIRES DEC. 17, 1988
Member, Pennsylvania Association of Notaries

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF WASHINGTON } ss:

Before me, the undersigned authority, a Notary Public in and for the Commonwealth and County aforesaid, personally appeared WILLIAM C. ENGLE, who, being by me first duly sworn according to law, deposes and says that the averments contained in the foregoing FIRST AMENDED COMPLAINT are true and correct to the best of his knowledge, information and belief, and that those averments of which he does not have personal knowledge he believes to be true and correct based upon the knowledge and information of others.

/s/ WILLIAM C. ENGLE
William C. Engle

Sworn to and Subscribed
before me this 9th day
of September, 1986.

/s/ CYNTHIA D. SNYDER
Notary Public

CYNTHIA D. SNYDER
WASHINGTON, WASHINGTON COUNTY
MY COMMISSION EXPIRES DEC. 17, 1988
Member, Pennsylvania Association of Notaries

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF WASHINGTON } ss:

Before me, the undersigned authority, a Notary Public in and for the Commonwealth and County aforesaid, personally appeared WILLIAM R. ENGLE, who, being by me first duly sworn according to law, deposes and says that the averments contained in the foregoing FIRST AMENDED COMPLAINT are true and correct to the best of his knowledge, information and belief, and that those averments of which he does not have personal knowledge he believes to be true and correct based upon the knowledge and information of others.

..../s/ WILLIAM R. ENGLE.....
William R. Engle

Sworn to and Subscribed
before me this 9th day
of September, 1986.

..../s/ CYNTHIA D. SNYDER....
Notary Public

MY COMMISSION EXPIRES:

CYNTHIA D. SYNDER
WASHINGTON, WASHINGTON COUNTY
MY COMMISSION EXPIRES DEC. 17, 1988
Member, Pennsylvania Association of Notaries

CERTIFICATE OF MAILING

I, Gordon F. Harrington, Esquire, certify that a true and correct copy of the First Amended Complaint was served this 11th day of September, 1986 upon the following counsel

Rose, Schmidt, Chapman, Duff & Hasley
Harold R. Schmidt
Richard DiSalle
Bruce C. Fuchs
900 Oliver Building
Pittsburgh, PA 15222-5369

McCreight, Marriner & Crumrine
Clarence A. Crumrine
800 Washington Trust Building
Washington, PA 15301

Attorneys for the Defendant by U.S. Postal regular mail.

. . . /s/ GORDON F. HARRINGTON . . .
Gordan F. Harrington, Esquire
Attorney for Plaintiffs

GREENLEE, DERRICO, POSA,
HARRINGTON AND RODGERS
325 Washington Trust Bldg.
Washington, PA 15301
412/344-9400

APPENDIX G

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

License (Major)—Constructed Projects—Water Quality—Environment

Before Commissioners: **John N. Nassikas, Chairman;**
Lawrence J. O'Connor, Jr.,
Carl E. Bagge,
John A. Carver, Jr., and
Albert B. Brooke, Jr.

West Penn Power Company) Project No. 2459

ORDER ISSUING LICENSE (MAJOR)

(Issued October 21, 1970)

Application was filed on April 8, 1964, and supplemented on September 8, 1964, and October 20, 1965, by West Penn Power Company (Applicant) of Greensburg, Pennsylvania, for a license under Section 4(e) of the Federal Power Act (Act) for constructed Project No. 2459, known as Lake Lynn Hydro Development, located on the Cheat River, a tributary of the Monongahela River, in Monongalia County, West Virginia, and Fayette County, Pennsylvania. No lands of the United States are affected by the project.

According to the application, construction of the project commenced in 1912. In 1913 construction of the dam was halted. It was resumed in 1925 and completed on May 31, 1926, when the first generating unit of 12,800 kw was placed in operation. Three other units, each of 12,800 kw capacity, went into operation by September 26, 1926.

There has been no project construction since the 1935 amendment to the Act.

The Department of the Interior, in reporting on the application, has advised that while the project reservoir is open for free recreational use, access facilities are either inadequate or will become so in the near future, and the Department recommended for inclusion in any license for the project the conditions in the interests of fish, wildlife and recreation, as set forth in attached Form L-3.

There are no historic properties listed in the National Register established under the provisions of Public Law 89-665 (80 Stat. 915) in the vicinity of the project.

The Department of Health, Education, and Welfare (now the function of the Federal Water Quality Administration) has advised that it considers it desirable that any license for the project should contain a provision requiring continuous passage of water quality control releases until completion of proposed Grays Landing Lock and Dam downstream on the Monongahela River, and requiring discharge thereafter of water quality control releases from Rowlesburg Reservoir as provided for in Article 32 herein.

We are including Article 35 herein which requires Applicant to submit to the Commission certification of reasonable compliance with applicable water quality standards pursuant to Section 21 (b) of the Water Quality Improvement Act of 1970 (P.L. 91-224).

Cognizant of our obligations under the National Environmental Policy Act of 1969 (83 Stat. 852) we have carefully considered the comments of the interested agencies. In that we do not consider this licensing order a "major Federal action significantly affecting the quality of human environment," we have not sent a detailed statement to

the Council on Environmental Quality. However by Article 36 herein, we are providing that Applicant shall consult and cooperate with interested local, State and Federal environmental agencies in the interest of preserving and promoting the environment of the project.

The project is located about 41 miles downstream from the site of the multiple-purpose Rowlesburg Reservoir authorized for construction by the U.S. Corps of Engineers. The Secretary of the Army and the Chief of Engineers have recommended for inclusion in any license for the project special conditions providing the water releases from Applicant's project during flood periods should not exceed flows that would have occurred in the absence of the project and that would insure releases for water quality control below Applicant's project, when the upstream Government multiple-purpose Rowlesburg Reservoir is constructed. The recommended conditions are included herein as Articles 32 and 33. The Corps stated that the interests of navigation would be satisfactorily protected by including in any license for the project the terms and conditions relating to navigation as set forth in attached Form L-3.

The Pennsylvania Fish Commission has advised that its staff has not indicated any reason to object to the granting of a license for the project.

Applicant has filed an Exhibit R which we are herein approving as a part of this license which shows existing recreational use and lands available for future recreational development. Presently developed recreation facilities include privately operated boat docks. Mont Chateau State Park and Coopers Rock State park adjoin the reservoir and provide opportunities for swimming, boating, fishing, hiking and ice skating. Although Applicant has no plans for

further development of recreation facilities it has designated certain lands as available for recreation outside the present project boundary which is drawn to follow the maximum pool elevation at 780 msl. By Article 34, herein, we are requiring Applicant to cooperate with State and local agencies in the development and maintenance of recreational facilities necessary for optimum recreational utilization by the public of project lands and waters and to file a revised Exhibit F and revised Exhibit K drawings to reflect the project boundary as including lands owned by the Applicant adjacent to the reservoir designated for recreation use.

The Monongahela River into which the Cheat River flows has been improved for navigation since about 1841, first under charter by the Commonwealth of Pennsylvania and then by the U.S. Corps of Engineers. The existing Federal navigation project on the Monongahela consists of nine locks and dams which provide navigation from Fairmont, West Virginia, located about one mile below the confluence of the Cheat and Monongahela Rivers, downstream to Pittsburgh where the Monongahela is joined by the Allegheny River to form the Ohio River. Commercial navigation on the Monongahela consists principally of coal, coke, sand, gravel, iron, steel and petroleum products. Such traffic for 1968 was reported by the U.S. Corps of Engineers as amounting to 40,232,458 tons. The Lake Lynn Hydro Development is located on Cheat River approximately 3½ miles above its mouth in the Monongahela River. During unusually dry seasons there is not sufficient water in the Monongahela River into which the Cheat River flows to provide satisfactorily for lockage for navigation on the Monongahela. The watershed of the Cheat River is an important factor in contributing to the

flow of both the Monongahela and the Ohio Rivers. In this connection, the application for license for the Lake Lynn Project recites that although the project is not designed to aid navigation. 53,500 acre feet of water was released from storage in the Lake Lynn Reservoir (drawn-down of 37.65 feet) during the severe drought of 1930 to maintain navigation in the Monongahela River below the mouth of the Cheat River.

Applicant requests a "fair value" license under the provisions of Section 23(a) of the Act. The application states that construction of the project was carried through under War Department approvals (copies of which were included in the application) of July 3, 1912, and August 6, 1913, under the supervision of the U.S. Army Engineers. The approvals were under the Act of March 3, 1899 (30 Stat. 1121) as amended by the Act of June 23, 1910 (36 Stat. 593). The July 3, 1912 approval constituted a 50-year permit which expired on July 2, 1962. It is clear that Applicant is not here seeking a "fair value" license in lieu of a permit; instead, it is seeking a fair value license to succeed the permit. Applicant could have filed a timely application for a "fair value" license in lieu of its permit. Under established Commission policies, if Applicant had sought such a license during the earlier periods of its permit, the Commission could have issued a "fair value" license either for the remainder of the permit term or, as was the case in some early situations, for a longer period. For the reasons set forth in Southern California Edison Company, Project No. 2290 (32 FPC 553; reh. den. 32 FPC 910) the request for a fair value license will be denied; and the license herein granted shall have an effective date of July 3, 1962

(the day following the expiration date of the War Department permit), and a termination date of December 31, 1993.

The Commission finds:

(1) The project affects navigable waters of the United States.

(2) Applicant is a corporation organized under the laws of the State of Pennsylvania and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effectuate the purposes of a license for the project.

(3) Public notice of the filing of the application has been given. No protests or petitions to intervene have been received. No conflicting application is before the Commission.

(4) The project does not affect a Government dam, nor will the issuance of a license therefor, as hereinafter provided, affect the development of any water resources for public purposes which should be undertaken by the United States.

(5) Subject to the terms and conditions hereinafter imposed, the project will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes.

(6) the installed horsepower capacity of the project hereinafter authorized for the purpose of computing the capacity component of the administrative annual charge is

68,300 horsepower, and the amount of annual charges, based on such capacity, to be paid under the license for the project, for the costs of administration of Part I of the Act is reasonable.

(7) The exhibits designated and described in paragraph (B) below conform to the Commission's rules and regulations and should be approved as part of the license for the project.

(8) It is appropriate in carrying out the provisions of the Federal Power Act that the application for a "fair value" license under Section 23(a) of the Act, be denied.

The Commission orders:

(A) This license is hereby issued to West Penn Power Company (Licensee) of Greensburg, Pennsylvania, under Section 4(e) of the Federal Power Act (Act), for a period effective as of July 3, 1962 and terminating December 31, 1993, for the continued operation and maintenance of Lake Lynn Hydro Development, Project No. 2459, located on the Cheat River, in Monongalia County, West Virginia, and Fayette County, Pennsylvania, subject to the terms and conditions of the Act, which is incorporated herein by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) Project No. 2459 consists of:

(i) all lands constituting the project area and enclosed by the project boundary or the licensee's interests in such lands, the limits of which are otherwise defined, the use and occupancy of which are necessary for the purposes of the project; such project area and project boundary being shown and described

by certain exhibits which form part of the application for license and which are designated and described as follows:

Exhibit J: (FPC No. 2459-1) entitled, "Lake Lynn P.S. General Map of Project—Lake Lynn, Pa.", signed for West Penn Power Company by Benjamin Bennett, Secretary, on March 31, 1964.

Exhibit K: (FPC Nos. 2459-2 and -3) entitled, "W.Va. Power & Transmission Co., Pittsburgh, Pa.—State Line Development—Key Map of Properties", signed for West Penn Power Company by Benjamin Bennett, Secretary, on March 31, 1964.

Exhibit K: (FPC No. 2459-4) entitled, "West Penn Power Co.—Lake Lynn P.S.—Plot Plan", signed for West Penn Power Company by Benjamin Bennett, Secretary, on March 31, 1964.

Exhibit K: (FPC Nos. 2459-6 through -16) entitled, "Topographic Map of State Line Reservoir", signed for West Penn Power Company by Benjamin Bennett on March 31, 1964.

(ii) a concrete gravity type dam 1,000 feet long with a maximum height of 125 feet; a reservoir at full pool (elevation 870) extends 13 miles upstream with an area of 1,729 acres, and contains 72,300 acre-feet; a 624 foot long spillway controlled by 26 tainter gates, each 17 feet high and 21 feet long with rubber seals; eight penstocks of reinforced concrete, 12 feet by 18 feet, a gatehouse 34 feet by 133 feet by 38 feet; a powerhouse of red brick with steel frame, 72 feet by 156 feet by 68 feet, containing four Francis reaction

type turbines each connected to a 16,000 kva generator rated at 0.8 p.f.; four 3-phase transformer banks; and other appurtenant facilities; the location, nature and character of which are more specifically shown and described by the exhibits hereinbefore cited and by certain other exhibits which also form a part of the application for license and which are designated and described as follows:

Exhibit L: (7 sheets)

(FPC No. 2459-19) Cheat Haven Power Station, Plan and Elevation of Dam.

(FPC No. 2459-20) Cheat Haven Dam—Cross Section.

(FPC No. 2459-21) Cheat Haven Dam—Cross Section of Power House.

(FPC Nos. 2459-22 through -25) Cheat Haven Power Station.

Exhibit M: Two typewritten pages, entitled, "General Description of Equipment", filed in the Commission on April 8, 1964.

Exhibit R:

consisting of:

1. Six typewritten sheets, entitled, "Statement of Utilization for Recreational Purposes", filed with the application.

2. Exhibit R-1 in two typewritten sheets, filed on October 20, 1965.

3. Exhibit R map (FPC No. 2459-28) entitled, "West Penn Power Company—Greensburg, Pa.—Lake Lynn Project—Recreational Utilization".

(iii) all other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(C) This license is also subject to the terms and conditions set forth in Form L-3 (Revised September 1, 1968) entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States" (40 FPC 1136), which terms and conditions, designated as Articles 1 through 30, are attached hereto and made a part hereof, and subject to the following special conditions set forth herein as additional articles:

Article 31. The licensee shall pay to the United States the following annual charge, effective as of July 3, 1962:

For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, a reasonable annual charge as determined by the Commission in accordance with the provisions of its regulations, in effect from time to time. The authorized installed capacity for such purpose is 68,300 horsepower.

Article 32. The operations of the licensee, so far as they affect the use, storage and discharge of water

quality releases from the proposed Rowlesburg Reservoir, shall be controlled at all times by such reasonable rules and regulations as may be hereafter prescribed by the Commission upon the recommendation of the authorized representative of the Secretary of the Army, in the interest of maintaining these water quality releases for the purpose intended. Licensee shall, upon completion of the proposed Rowlesburg Project, modify operations prior to the time the Grays Landing Dam is operational to pass continuously through Lake Lynn the flows released from the Rowlesburg Project for water quality control. When the Grays Landing Dam is operational, all water released as regular discharge from the Rowlesburg reservoir shall be passed through Lake Lynn within the following 24 hours and at a rate of not less than 2,000 c.f.s.

Article 33. The licensee shall not release from Lake Lynn reservoir, during flood periods, flows that will exceed those which would have occurred in the absence of the project. Project operating procedures to assure compliance with this requirement shall be developed cooperatively by the Licensee and the District Engineer, U.S. Army Engineer District, Pittsburgh.

Article 34. Licensee shall cooperate with State and local agencies in the planning, development, and maintenance of access areas and roads, water control structures, and such other facilities necessary for optimum recreational utilization by the public of project lands and waters consistent with the terms of the license and the operation of the project and shall within 90 days from the date of acceptance of this license, file a revised Exhibit F and revised Exhibit K drawings to include within the project boundary lands

owned by Licensee adjacent to the reservoir designated for recreation use.

Article 35. Licensee within one year after date of issuance of this license shall submit to the Commission certification of reasonable compliance with applicable water quality standards pursuant to Section 21(b) of the Water Quality Improvement Act of 1970 (P.L. 91-224).

Article 36. In the interest of preserving and promoting the environment of the project area, Licensee shall consult and cooperate with interested local, State and Federal environmental projection agencies, and the Commission reserves the right, after notice and opportunity for hearing, to require such changes in the project and its operation as may be necessary to preserve and promote the environment of the project area.

(D) The exhibits designated and described in paragraph (B) above are hereby approved as part of this license.

(E) The Licensee shall within 90 days from the date of acceptance of this license, file in accordance with the provisions of Section 11.20(a)(4) of the Commission's Regulations a statement under oath showing the gross amount of power generation for the project in kilowatt-hours for each calendar year commencing July 3, 1962.

(F) The Commission reserves the right to determine at a later date what additional transmission facilities, if any, should be included in this license as part of the project.

(G) The application for a "fair value" license under the provisions of Section 23(a) of the Act for Project No. 2459, is hereby denied.

(H) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Act, and failure to file such an application shall constitute acceptance of this license. In acknowledgment of the acceptance of this license, it shall be signed for the licensee and returned to the Commission within 60 days from the date of issuance of this order.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Acting Secretary.

IN TESTIMONY of its acknowledgment of acceptance of all of the provisions, terms and conditions of this license WEST PENN POWER COMPANY, this 16th day of December, 1970, has caused its corporate name to be signed hereto by D. M. Kammert, its President, and its corporate seal to be affixed hereto and attested by Benjamin Bennett, its Secretary, pursuant to a resolution of its Board of Directors duly adopted on the 24th day of November, 1970, a certified copy of the record of which is attached hereto.

WEST PENN POWER
COMPANY

By .../s/ D. M. KAMMERT.....
President

Attest:

...../s/ BENJAMIN BENNETT.....
Secretary

(Executed in quadruplicate)

CERTIFICATE

I, Carroll E. Summers, Assistant Secretary of West Penn Power Company, a Pennsylvania corporation, DO HEREBY CERTIFY that attached hereto is a true and complete copy of a resolution duly adopted by the Board of Directors of said Company at a meeting duly called and held on November 24,1970, at which a quorum was present and acting throughout, and that said resolution has not been in anywise altered or revoked and is still in full force and effect.

WITNESS by hand this 17th day of December, 1970.

/s/ CARROLL E. SUMMERS
Assistant Secretary

RESOLVED that the President or any Vice President of this Company is hereby authorized to execute, in the name and on behalf of this Company, an acknowledgment of acceptance of all of the provisions, terms and conditions of the Federal Power Commission license for Project No. 2459 issued October 21, 1970, and that the Secretary or any Assistant Secretary of this Company is hereby authorized to affix the Company's corporate seal thereto and to attest the same and to return said license to the Federal Power Commission.

FORM L-3

(REVISED SEPTEMBER 1, 1968)

TERMS AND CONDITIONS OF LICENSE FOR CONSTRUCTED PROJECT AFFECTING NAVIGABLE WATERS OF THE UNITED STATES

Article 1. The project, as described in the order of the Commission, shall be subject to all the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as part of the license, until such change shall have been approved by the Commission: *Provided*, however, that if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval amended, supplemental, or additional exhibit or exhibits covering the proposed change which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project area and project works shall be in conformity with the approved exhibits referred to in Article 2 hereof. If the Licensee shall comtemplate any substantial alteration in or addition to the project area or project works shown and described by the approved exhibits referred to in Article 2 herein, the Licensee shall submit to the Commission for approval amended, supplemental, or additional exhibits under the provisions of said article covering such alteration or addition, together with a statement in writing setting forth the reasons which necessitate

or justify such alteration or addition. Except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works under the license without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in the project works or divergence from such approved exhibits may be made if such changes will not result in decrease in efficiency, in material increase in cost, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

Article 4. The project, including its operation and maintenance and any work incident to additions or alterations authorized by the Commission, shall be subject to the inspection and supervision of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him such information as he may require concerning the operation and maintenance of the project, and of any such alteration thereof, and shall notify him of the date upon which work with respect to any alteration will begin, and as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than

one week, and of its resumption and completion. Licensee shall submit to said representative a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of any such alterations to the project. Construction of said alterations or any feature thereof shall not be initiated until the program of inspection for the alterations or any feature thereof has been approved by said representative. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may from time to time prescribe for the protection of life, health or property.

Article 5. In the absence of specific Commission exemption, the Licensee within five years from date of issuance of the license shall acquire title in the or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the maintenance and operation of the project. The Licensee, its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission, except that the Licensee may lease or

otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or ineffcient for further service due to wear and tear; and mortgage or trust deed or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Article 6. In the event the project in taken over by the United States upon the termination of the license, as provided in Section 14 of the Act, or is transferred to a new licensee under the provisions of Section 15 of the Act, the Licensee, its successors and assigns will be responsible for and will make good any defect of title to or of right of occupancy and use in any of such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge, or will assume responsiblility for payment and discharge, of all liens or incumbrances upon the project or project property created by the Licensee or created or incurred after the issuance of the license: *Provided,* That the provisions of this article are not intended to require the Licensee, for the purpose of transferring the project to the United States or to a new Licensee, to acquire any different title to or right of accupancy and use in any of such project property than was necessary to acquire for its own purpose as Licensee.

Article 7. The actual legitimate original cost, estimated where not known, and the accrued depreciation of the project as of the effective date of the license shall be

determined by the Commission in accordance with the Act and the rules and regulations of the Commission, and such cost less such accrued depreciation, so determined, shall be the net investment in the project as of such effective date.

Article 8. After the first 20 years of operation of the project under the license, six percent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings of the project for the establishment and maintenance of amortization reserves, pursuant to Section 10(d) of the Act; one-half of the project surplus earnings, if any, accumulated after the first 20 years of operation under the license, in excess of six percent per annum on the net investment, shall be set aside in a project amortization reserve account as of the end of each fiscal year: *Provided*, that, if and to the extent that there is a deficiency of project earnings below six percent per annum for any fiscal year or years after the first 20 years of operation under the license, the amount of such deficiency shall be deducted from the amount of any surplus earnings accumulated thereafter until absorbed, and one-half of the remaining surplus earnings, if any thus cumulatively computed, shall be set aside in the project amortization reserve account; and the amounts thus established in the project amortization reserve account shall be maintained therein until further order of the Commission.

Article 9. For the purpose of determining the stage and flow of the stream or streams from which water is diverted for the operation of the project works, the amount of water held in and withdrawn from storage, and the effective head on the turbines, the Licensee shall install and thereafter maintain such gages and stream-gaging stations as the Commission may deem necessary and best adapted to the requirements; and shall provide for the

required readings of such gages and for the adequate rating of such stations. The Licensee shall also install and maintain standard meters adequate for the determination of the amount of electric energy generated by said project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission and may be altered from time to time if necessary to secure adequate determinations, but such alteration shall not be made except with the approval of the Commission or upon the specific direction of the Commission. The installation of gages, the ratings of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of said project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient record of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 10. The Licensee shall install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so, after notice and opportunity for hearing.

Article 11. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power systems and in such manner as the Commission

may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing or benefits by the Licensee as the Commission may order.

Article 12. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such determination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States the Licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the costs of making the determinations pursuant to the then current Commission Regulations under the Federal Power Act within 60 days from the date of rendition of a bill therefore and, upon failure to do so, shall thereafter be subject to the payment of the penalties specified in the then current Regulations. The Licensee shall have the right to pay such amounts under protest within the 60-day period and to reconsideration of the determination of the amounts billed or a hearing as provided by the then current Regulations under the Act.

Article 13. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purpose of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of

waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes herein before mentioned.

Article 14. On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall, after notice and opportunity for hearing, permit such reasonable use of its reservoirs or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission in the interest of comprehensive development of the waterway or waterways involved and the conservation and utilization of water resources of the region, for water supply for the purpose of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation, at least full reimbursement for any damages or expenses which the joint use causes him to incur, for use of its reservoirs or other project properties or parts thereof for such purposes, any such compensation to be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full

understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot be concurrently submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

Article 15. In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and device to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive interference.

Article 16. The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintainance and operation of such facilities and comply with such reasonable modifications of the project structures and operation as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior of the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing and upon findings based on substantial evidence that such facilities and modifications are necessary and desirable,

reasonably consistent with the primary purpose of the project, and consistent with the provisions of the Act.

Article 17. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of Licensee's land and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be prescribed by the Commission, reasonably consistent with the primary purpose of the project, in order to permit the maintainance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under the license.

Article 18. The Licensee shall construct, maintain and operate or shall arrange for the construction, maintenance and operation of such recreational facilities including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities and utilities, and shall comply with such reasonable modifications of the project structures and operations as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal and State agencies, after notice and opportunity for hearing and upon findings based upon substantial evidence that such facilities and modifications

are necessary and desirable, and reasonably consistent with the primary purpose of the project.

Article 19. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and recreational purposes, including fishing and hunting, and shall allow to a reasonable extent for such purposes the construction of access roads, wharves, landings, and other facilities on its lands the occupancy of which may in approporiate circumstances be subject to payment of rent to the Licensee in a reasonable amount: *Provided, that* the Licensee may reserve from public access, such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property and *Provided, further,* that the Licensee's consent to the construction of access roads, wharves, landings, and other facilities shall not, without its express agreement, place upon the Licensee any obligation to construct or maintain such facilities. These facilities are in addition to the facilities that the Licensee may construct and maintain as required by the license.

Article 20. The Licensee shall be responsible for and shall take reasonable measures to prevent soil erosion on lands adjacent to the stream and to prevent stream siltation or pollution resulting from construction, operation or maintenance of the project. The Commission upon request, or upon its own motion, may order the Licensee to construct and maintain such preventive works to accomplish these purposes and to revegetate exposed soil surface as the Commission may find to be necessary after notice and opportunity for hearing.

Article 21. The Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or inflammable material resulting from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees located along the margins of reservoirs within the project boundaries which may die during operations of the project shall be removed. The clearing of the lands and the disposal of the material shall be done with due diligence and to the satification of the authorized representative of the Commission.

Article 22. Insofar as any material is dredged or excavated in the prosecution of any work authorized under the license, or in the maintenance of the project, such material shall be removed and deposited so it will not interfere with navigation, and will be to the satisfaction of the District Engineer, Department of the Army, in charge of the locality.

Article 23. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the project, the Licensee shall convey to the United States, free of cost, such of its lands and its rights-of-way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete and maintain such navigation facilities.

Article 24. The Licensee shall furnish free of cost to the United States power for the operation and maintenance of navigation facilities at the voltage and frequency required by such facilities and at a point adjacent thereto whether said facilities are constructed by the Licensee or by the United States.

Article 25. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure constituting a part of the project works shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army.

Article 26. The Licensee shall for the protection of navigation, construct, maintain and operate at its own expense such lights and other signals on fixed structures in or over navigable waters of the United States as may be directed by the Secretary of the Department in which the Coast Guard is operating.

Article 27. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project for a period of three years, or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license, and not less than 90 days after public notice may in its discretion terminate the license.

Article 28. Upon abandonment of the project the Licensee shall remove all structures, equipment and power lines from the stream and restore said stream to a condition satisfactory to the Commission's authorized representative and shall fulfill such other obligations under the license as the Commission may prescribe.

Article 29. The right of the Licensee and of its transferees and successors to use or occupy waters, over which the United States has jurisdiction, under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless Licensee has obtained a new license pursuant to the then existing laws and regulations or an annual license under the terms and conditions of this license.

Article 30. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

H-1

FLOOD DAMAGES ALONG THE MONONGAHELA AND CHEAT RIVERS IN PENNSYLVANIA AND WEST VIRGINIA AS THE RESULT OF SEVERE FLOODING IN NOVEMBER 1985

(99-41)

HEARING

BEFORE THE

SUBCOMMITTEE ON WATER RESOURCES

OF THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

FEBRUARY 7, 1986, AT POINT MARION, PA

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Committee on Public Works and Transportation

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TESTIMONY OF RONALD A. CORSO, DIRECTOR, DIVISION OF INSPECTIONS, OFFICE OF HYDROPOWER LICENSING, FEDERAL ENERGY REGULATORY COMMISSION; ACCOMPANIED BY DON GARBER, DEPUTY DIRECTOR, OFFICE OF HYDROPOWER LICENSING, AND PAMELA W. SIMPSON, HOUSE LIAISON; AND ALDO T. ANGELO, SUPERVISORY HYDROLOGIST, NATIONAL WEATHER SERVICE, PITTSBURGH, PA

MR. CORSO. Mr. Chairman and members of the Subcommittee on Water Resources, I appreciate the opportunity to appear before you today on behalf of the Federal Energy Regulatory Commission, or FERC, to testify on the devastating flood that occurred on the Monongahela River and Cheat River in early November 1985. My position with FERC is Director, Division of Inspections, Office of Hydropower Licensing. I am responsible for supervising the Commission's dam safety program and post-license administration, which includes ensuring the licensees properly construct, operate, and maintain licensed projects. My testimony reflects the views of the staff of the Division of Inspections, Office of Hydropower Licensing.

Also attending from the Commission are Ms. Pamela W. Simpson, House liaison, and Mr. Don Garber, Deputy Director, Office of Hydropower Licensing.

Pursuant to its authority under the Federal Power Act, the FERC licenses non-Federal hydroelectric projects. Therefore, the Commission has jurisdiction over the Lake Lynn project. The license for the Lake Lynn project was issued in 1970.

In view of the committee's inquiry and pursuant to the Commission's regulations, the staff of the Division of Inspections has conducted its own independent investigation. We have reviewed hydrologic data and the project operation by the licensee during the flood event of November 4 and 5, 1985. Our review found that operation of the project was consistent with the license. We have also independently confirmed that the licensee did issue advance flood warnings in accordance with the procedures outlined in the Emergency Action Plan required by the Commission's regulations.

In evaluating the operation of Lake Lynn Dam during this unusual flood event, it is important to note that the project was constructed for the primary purpose of generating hydroelectric power and that Lake Lynn has no storage capacity for flood control. Our review of the licensee's operation of the project powerhouse on November 4 and 5, 1985, to lower the reservoir and the subsequent operation of the spillway gates on November 4 and 5, 1985, indicates that the project did not have any significant effect on the peak flood flows that occurred downstream on the Monongahela River and Cheat River.

The spillway gates were gradually opened to pass the extreme flood flows that entered the reservoir. The unprecedented magnitude of the flood also created a large amount of debris that was trapped by the dam. While the debris did cause clogging of the spillway gates, our analysis indicates that this had no significant effect on the peak flows downstream of the project.

We also reviewed the licensee's procedures in implementing the emergency action plan required by the Commission's regulations. We contacted the Corps of Engineers and officials of Fayette and Greene Counties. All parties

indicated that the licensee provided adequate notification and maintained communication throughout the flood event.

The license for the Lake Lynn project includes article 33, in the license pursuant to a recommendation by the Corps of Engineers at the time of licensing. Article 33 requires that the project be operated so as not to cause a flood peak greater than would have occurred in the absence of the project. Our review indicates that the licensee complied with the license requirement.

In conclusion, our review indicates that the licensee complied with the license for the Lake Lynn project and the Commission's regulations.

This concludes the summary of my testimony. I will be glad to answer any questions.

MR. ROE. Mr. Garber, have you anything to add?

MR. GARBER. No sir, I do not.

MR. ROE. How about Mr. Angelo?

MR. ANGELO. I have a summary. Would you like to hear it?

MR. ROE. Yes.

MR. ANGELO. Mr. Chairman and members of the subcommittee, I appreciate this opportunity to provide information on the flood of November 4 to 6, 1985 in the Monongahela River basin. I am going to give some details on weather factors, flood magnitude, the flood warnings and suggested improvements related to this event.

First, I am going to describe the weather situation prior to the flood event. I have provided you a map of the United States depicting the major atmospheric features

(figure 1). On the surface, an easterly moving surface trough, combined with a low pressure center originating off the South Carolina coast formed an intense low pressure center in the Tennessee Valley. This system caused record rainfalls and devastating flooding in the Mid-Atlantic States of West Virginia, Virginia, Pennsylvania, and Maryland.

On the morning of November 3 a weak surface low (1,006 mbs) was located in the gulf coast of Florida with a trough extending northward into the Great Lakes. At upper levels a 500 millibar trough was located about 350 miles west of the surface trough. During the next 24 hours, the surface low moved northeastward to South Carolina (figure 2) and began intensifying.

Portions of the southern Appalachians received rainfall in excess of 10 inches during the first 5 days of November 1985, with one location, Montebello, VA, reporting over 18 inches in this period. Most of the rainfall occurred on November 3 and 4 with 4- to 8-inch amounts common in many locations in the Appalachians.

I have furnished a map showing the Monongahela River basin, the storm rainfall amounts over the basin, and the area we are most concerned with, the Cheat River basin. I will point out the geographic features as I go along.

The maximum 24-hour total of 6.82 inches of precipitation was reported at Pickens, WV, at 0700 eastern standard time on the 5th. Pickens is located in the headwaters of the Tygart River above Tygart Dam. The maximum recorded 24 hour amount of rainfall in the Cheat River basin was 5.20 inches at Bemis, WV.

The storm center of maximum rainfall occurred to the east of the Cheat River basin in the Potomac drainage

basin. Thus, it appears that the rainfall on the ridges bordering the eastern part of the Cheat basin was substantially higher than elsewhere in the basin, although we have no reports to confirm this. Elsewhere, over the upper Monongahela River, 24-hour rainfall amounts ranged from 4 to 8 inches.

The very heavy rainfall caused the rivers and streams to rise at unprecedented rates along the Cheat, Tygart and West Fork Rivers. Rainfall amounts that occurred during this storm are more commonly associated with summer type thunderstorms. The surface, during the summer months is covered with vegetation and absorption rates are high. During the winter months, a heavy snowpack would have slowed down the runoff. However, in this case, with the surface stripped of vegetation and snow cover, the runoff was extremely rapid.

Early on November 5 river rises exceeding 2 feet an hour occurred on the Monongahela River at many locations, including Point Marion. Figure 4 shows the observed river stages for selected stations along the West Fork, Cheat and the Monongahela Rivers. I would like to call your attention to the information on lock 8, Point Marion, PA, Parsons, WV, and the Lake Lynn Power Dam. Along the headwater streams, including the Cheat, West Fork and Tygart Rivers, the rates of rise were much higher.

Parsons, WV is the farthest point upstream for which the National Weather Service receives meaningful stage data. Lake Lynn Power Dam is the next point downstream, and Point Marion is the last point for which the National Weather Service receives data on the Cheat River. Note that many stage observations are missing, signified by the letter M on figure 4. The observations were

missed because the gauges become inaccessible due to the severity of the flooding.

You can see that there is very little information on the river stage at Parsons, WV, above Lake Lynn Dam. The crest at lock 8, Point Marion, was 44.4 feet, which occurred at 3:45 p.m. on November 5 according to a report we received from the Corps of Engineers. This crest was 18 feet above flood stage and almost 11 feet higher than the previous flood of record.

As a matter of fact, the flood of November 4-7, 1985, exceeded all previous flood records at nearly all locations on the rivers and streams above lock 4, Charleroi, PA. Figure 5 shows this comparison.

The National Weather Service issues flood warnings whenever they determine that river rises will exceed the flood stage at established forecast points. Flood stage is defined as the river stage at which damage begins to occur.

The National Weather Service released the first flood warning for Point Marion at 8:40 p.m., November 4. Flooding began around 2 a.m. on the 5th, and the crest occurred at 3:45 p.m. on the 5th. The National Weather Service periodically updated the Monongahela River forecasts as rainfall and river stage data became available. All gauges along the Cheat River were destroyed by the water early in the flood period. Point Marion became the first river station where the flow of the Cheat River could be determined.

National Weather Service flood warnings are issued through various public and private agencies. The accompanying figures 6 and 7 show the flow of information in river forecasting and warning.

Flood warnings are disseminated through local news media, including radio, TV, and newspaper. National Weather Service river forecasters provide a great deal of river and flooding information to the public by telephone to radio stations. Often information is provided through on the air interviews on radio and TV.

The fast responding rivers experienced in this particular flood required a rapid dissemination procedure to insure that warnings were received in time for adequate response. NOAA Weather Radio, broadcasting from the National Weather Service office in Pittsburgh, carried the latest flood and severe weather warnings directly to the public, emergency management officials, and other media. The telephone call-up lists, and telephone warning trees also are effective devices for disseminating warnings.

The interagency hazard mitigation report, FEMA-754-DR for Pennsylvania, concluded that a breakdown of warnings occurred with local dissemination of data. This is beyond the scope of current National Weather Service dissemination systems.

The heavy rainfall, during a normally dry time of the year when soil conditions are conducive to high runoff rates, was the cause of this natural disaster. Funds added by Congress to NOAA's fiscal year 1986 appropriation for the Integrated Flood Warning System Program will provide upgraded local flood warning systems in the counties hardest hit by these floods. The $3 million add-on will help purchase and install rainfall or streamflow gauges and provide communications and data processing equipment. The States and localities will then pay the costs of operating and maintaining the systems.

The best flood forecast is useless if the public cannot interpret it. Flood awareness programs, initiated at local levels by Federal and State emergency management personnel, would be much more effective than those conducted by the National Weather Service. This is because the specific needs of each community could be incorporated into an appropriate response procedure.

Posting various flood high water marks with gauge heights relating to the official flood forecast gauges would help the local citizenry understand the impact of the various river stage forecasts. Victims of past floods should label high water marks with appropriate river crests relating to the nearest official flood forecast gauge.

Thank you for the opportunity to discuss the river and flood forecasting program of the National Weather Service. I will be happy to answer the committee's questions concerning the events of November 3-6, 1985.

MR. ROE. Yes, sir.

MR. MURPHY. Thank you, Mr. Chairman.

I will ask Mr. Corso the first question. The Federal Management Agency, immediately after the flood, their reports recommended that the emergency operations procedures at the dam, at Lake Lynn, be monitored and improved, that existing emergency operations procedures be exercised and that the dam operations be tied into an overall flood basin preparedness program.

Can you comment on their findings or were you made aware of their findings in December?

MR. CORSO. Yes sir, Congressman Murphy. I believe you are referring to a report that FEMA issued recently

which alluded to the emergency action planning surrounding this event. All licensed projects of the FERC are required to have an emergency action plan and Lake Lynn is one of those projects that does have an emergency action plan. Under such plans, they are required to notify the officials of local emergency preparedness agencies who have the authority and the ability to warn people at the local level, and evacuate if necessary. Our information, in checking it with the counties particularly, indicates that the Commission's requirement for an emergency action plan was implemented by the power company.

We were not involved in that particular report and we have suggested to FEMA that it might be well for the FERC to be a participant in the preparation of such reports in the future.

MR. MURPHY. Who makes up such a plan as that?

MR. CORSO. We have specific regulations and guidelines that instruct the owner of the dam on the preparation of the plan. It is the owner's responsibility to prepare the plan, submit it to the Commission and it is approved. If approved, then they can implement it. If there is some problem with it, we require the changes necessary to make it workable.

MR. MURPHY. Their plan has not been updated or approved since 1970 when you issued the license?

MR. CORSO. No. I should mention that all emergency action plans are required to be updated annually. It is updated on a current basis.

MR. MURPHY. Were you satisfied with the data that the power company gave you that they had sufficiently notified the county emergency units involved?

MR. CORSO. Well, we went one step beyond that. We actually contacted the officials in the counties and they indicated that they were appropriately notified.

MR. MURPHY. Can you give us the date that Greene County was notified, the date and time?

MR. CORSO. Yes, sir.

MR. MURPHY. To whom?

MR. CORSO. The Greene County Emergency Management Agency was contacted. A Mr. Mellers is the person responsible, in charge, and a Mr. Long is the person second in charge. Mr. Mellers was unavailable but the company was able to get in touch with Mr. Long.

MR. MURPHY. You notifed Mr. Long then?

MR. CORSO. They notified him before they began opening the gates that there was going to be a significant rise in the flood stage downstream.

MR. MURPHY. You don't know the exact time or the date?

MR. CORSO. I can get that for you. I don't have it right here at hand at the moment.

MR. MURPHY. I would appreciate it if you would give us the exact time and date and to whom the notice was given.

MR. CORSO. OK.

MR. MURPHY. As well for Fayette County. Do you have that?

MR. CORSO. Yes sir. They also contacted Fayette County similarly—the Emergency Preparedness Agency,

and notified them before opening the gates, and we can provide the exact times if you wish.

MR. MURPHY. You will provide to the committee the exact time and persons who were supposed to have been notified?

MR. CORSO. Yes, sir.

[The following was received from Mr. Corso:]

GAI Consultants, Inc.

Table 2

LAKE LYNN DAM
FEDERAL ENERGY REGULATORY COMMISSION
WARNING AND EVACUATION PLAN
NOTIFICATIONS GIVEN UNDER PLAN
NOVEMBER 4 THROUGH 10, 1985(1, 2)

First Stage Alert

Fayette County Emergency Management Agency. At 2217 hours on November 4, Mr. Lance Winterhalter was called. Winterhalter was not in at the time but returned the call at 2233 hours on November 4.

Greene County Emergency Management Agency. At 2219 hours on November 4, Sergeant Mitchell (Greene County Jail) was notified.

Second Stage Alert

Fayette County Emergency Management Agency. At 2323 hours on November 4, Mrs. Winterhalter was notified.

Greene County Emergency Management Agency. At 2326 hours on November 4, Herb McCabe was notified (Greene County Jail).

Third Stage Alert

Fayette County Emergency Management Agency. At 0035 hours on November 5, Mr. Winterhalter was notified.

Greene County Emergency Management Agency. At 0044 hours on November 5, the Greene County Jail was notified.

Federal Energy Regulatory Commission. At 0053 hours on November 5, Mr. Anton Sidoti was notified.

Fourth Stage Alert

Fayette County Emergency Management Agency. At 0204 hours on November 5, Mr. Mellors was notified.

Greene County Emergency Management Agency. At 0205 hours on November 5, Mr. Yoders was notified.

Federal Energy Regulatory Commission. At 0208 hours on November 5, Mr. Sidoti was notified.

Downgrade to Third Stage Alert

Fayette County Emergency Management Agency. At 1344 hours on November 7, Ms. Debbie Sharon was notified.

Greene County Emergency Agency. At 1345 hours on November 7, Mr. Wayne Long was notified.

Federal Energy Regulatory Commission (Regional Engineer). At 1348 on November 7, Ms. Rebecca Debes was notified.

Downgrade to Second Stage Alert

Fayette County Emergency Management Agency. At 2000 hours on November 7, there was no answer.

Greene County Emergency Management Agency. At 2000 hours on November 7, Mr. Yoders was notified.

Downgrade to Normal

Fayette County Emergency Management Agency. At 1425 hours on November 10, there was no answer.

Fayette County Emergency Management Agency. At 0805 hours on November 12, Naomi (no last name given) was notified.

Greene County Emergency Management Agency. At 1425 hours on November 10, Mr. Broch was notified.

(1) This information was provided to GAI by West Penn Power Company personnel.

(2) This information was taken by West Penn Power Company personnel from logs and tapes from the West Penn Power Transmission and Distribution Center.

MR. MURPHY. Why wasn't anyone in Washington County notified?

MR. CORSO. They are further downstream and not within the emergency action plan of the Lake Lynn project per se.

MR. MURPHY. Are they notified?

MR. CORSO. Well, we are reviewing the emergency action plan in view of this flood event and to the extent that improvements are necessary. We will require the company to do so.

MR. MURPHY. Well, I would think that you would want to do that. Washington County commences not too far down the river, not down below lock 7.

MR. CORSO. Yes sir, I know that.

MR. MURPHY. Certainly before you hit Maxwell. So I would certainly urge you to insist that the power company amend their plan to notify the officials in Washington County as well.

MR. CORSO. Generally, the emergency action plans are structured to warn people in the immediate area, because there are other structures further downstream. As it progresses downstream, the responsibility progresses downstream. We will certainly look at that, as you requested.

MR. MURPHY. Were you made aware that the people at Lake Lynn—did they contact the Corps of Engineers or not, or do you verify that or find out whether they did or not?

MR. CORSO. Yes, they did contact the Corps of Engineers also, and were in constant communication throughout the event.

MR. MURPHY. Do you know where and who in the corps?

MR. CORSO. They were in communication with the Pittsburgh district.

MR. MURPHY. Pittsburgh district is a lot of area.

MR. CORSO. Well, I don't know the name of the persons specifically, but we have it in our files right at the moment. We can provide that for the record.

MR. MURPHY. Would you let us know that as well?

MR. CORSO. Yes, sir.

MR. MURPHY. Thank you.

[The following was received from Mr. Corso:]

Regarding notification of the Corps of Engineers, West Penn Power Company notified operating personnel at Lock and Dam No. 7 at 5:16 p.m. and 7:14 p.m. on November 4, 1985, and kept contact thereafter through November 5, 1985.

MR. ROE. Mr. Clinger.

MR. CLINGER. Thank you, Mr. Chairman.

Mr. Corso, you have indicated that you are undergoing a review of the emergency management plan for the licensee. First, as I understand it, that plan is updated every year?

MR. CORSO. Yes, sir.

MR. CLINGER. How long does the license review take, the entire license review?

MR. CORSO. Well, this particular license I believe expires in 1993, so that would be the next review period.

MR. CLINGER. Have you reached any preliminary conclusions as a result of what occurred here November 4 for

changes in that emergency management plan, or is it premature?

MR. CORSO. I think it is premature right now. It is our normal procedure to review any emergency action plan after an event as devastating as this one, to see if there are improvements that can be made and that will be done in a very short term.

MR. CLINGER. Mr. Angelo, you testified concerning your notification or warning of local citizens, and that you were tied in directly with radio stations and television in the area. Is it mandatory for those radio stations and television stations to provide this service or is it on a voluntary basis?

MR. ANGELO. It is mandatory. It is a condition of their licensing, and they are required to issue any warnings. Anything we send out over the wires that indicates it is a warning or a bulletin of some nature, they are required to broadcast immediately. They don't always do it, but they are required to.

MR. CLINGER. That was my next question. Did you feel that there was satisfactory publication of this notice after your alert?

MR. ANGELO. No. We felt that they could have done a better job. We had a number of complaints from citizens along the Monongahela River that did not receive the warnings that we had issued and we are presently in some type of negotiations with the local TV, particularly the TV people, working on some better way to display the flood warnings as we issue them. We haven't done anything concrete yet but we are looking into that.

MR. CLINGER. But you say it is a part of their licensing that they are obliged to carry these warnings?

MR. ANGELO. Yes, it is a responsibility they have to do that.

MR. CLINGER. And what kind of leverage do you have to insure that they do that?

MR. ANGELO. We have no leverage at all. They can be denied a license if they don't do it. That is the only thing that we can do, we can appeal to—and of course, we don't have the power to do that—that is up to the FCC.

MR. CLINGER. The timing of this particular notification was what you notified the media at what time and at what time did the—

MR. ANGELO. I know what time we notified them, I don't know what time they broadcast it. I don't know what the lag time was between the issuance, between our issuance and of the issuance that was made by the TV station. We don't keep records of that.

MR. CLINGER. Well, at what time did you send out a notification?

MR. ANGELO. We sent out the first notice—I have it here—as I recall the evening of the 4th we began to put out flood warnings, but the first one that we sent listing, indicating that we would have a flood at Point Marion is in this testimony here. It is in the testimony, sir.

MR. CLINGER. Did you issue a flood watch before the warning?

MR. ANGELO. Yes, we had flood watches out earlier that evening. Actually, on the afternoon of the 4th we

issued our first flood warnings for southwestern Pennsylvania and then after the rain fell, we had some indication we were having heavy rain in the upper reaches, we began to issue specific flood forecasts for the points along the river for which we are responsible, and we put the first ones out on the evening of the 4th. I believe if I recall correctly about 8:40 that evening we had our first flood warnings to the four specific points along the Monongahela River above Lake Lynn.

MR. WISE. The flood watches you put out to Pennsylvania would also apply to West Virginia, wouldn't they?

MR. ANGELO. No, our office in Pittsburgh has warning responsibility only for the State, only for the area in Pennsylvania. The Charleston, WV Weather Service Office would issue flood warnings for West Virginia.

MR. WISE. Would that be the office providing flood warnings though for the northern part of West Virginia, including the area in Rowlesburg and so on.?

MR. ANGELO. Yes sir, that is correct.

MR. WISE. But I assume you all were in communication?

MR. ANGELO. We had provided them with the actual flood forecasts for that area, and we are the National Weather Service Forecast Center and we are responsible for making the forecasts for the northern part of West Virginia, which includes the Upper Monongahela River, and we send them to Charleston and they have the responsibility to issue the warning to the local public.

MR. WISE. Now, as I look at your flow chart, are you the agency that actually supplies the Corps of Engineers with the information about what is coming?

MR. ANGELO. Yes sir, we provide the corps with the flood forecasts all the points that we provide other people. We have a direct network with the corps, telephone network. Everytime we make a flood forecast for any part of Pennsylvania, any part of our warning area responsibility, we immediately call the corps and pass that information to them.

MR. WISE. If I am sitting in Point Marion or sitting in Rowlesburg or whatever, whom should I be calling if I am concerned. Do I call you or call the corps?

MR. ANGELO. You would call us if you wanted any information on flooding. We issue that to the corps for their own internal use so they would know. They would use that hopefully to control their flood-control dams and et cetera.

MR. WISE. Thank you very much.

MR. MURPHY. Mr. Chairman.

MR. ROE. I have listened intently to your presentation. I think you have done a good job, but it seems to me that we have a situation existing—at least from what I have heard, I think Mr. Angelo began to touch upon that in his testimony—that the coordination is fine provided the operation is successful, but the patient died. It has got to get to the people so the people have the proper coordinated warning. That would be No. 1, it seems to me.

The second thing it seems to me is the manipulation, if you like, that has been part of the earlier testimony with the corps and other folks involved, of the different structures, and what is to be done to be coordinated in some way. That ought to be responded to because it is not necessarily the amount of rainfall, it is what actions took place

during the rainfall that helped to mitigate part of the problem.

So how well is it coordinated. I am curious. It seems to me that that input ought to go to some place in the State area or river basin area where the people have got the whole picture. They are getting some response from, at least as I understand your testimony from you, they are getting some response from Mr. Corso, vis-a-vis his responsibilities as far as the Lynn Dam is concerned. That filtered back into the Corps of Engineers to make some kind of dissertation or whatever action they were to take to be helpful in lowering the pool or whatever. How does that get coordinated, the impact of that, or does it? That is my concern.

MR. ANGELO. Let's start from our standpoint. We collect river and weather information, particularly precipitation observations, from a number of observers that we have in the field and a number of those people are at Corps of Engineers locks and dams. We monitor the weather situation and with that we try to anticipate whether we are going to have a problem anywhere.

When we determine that we are going to have a flood at a particular point, we issue a flood warning. We send that through the local media and it goes to the TV stations, radio stations, all the people that we have connected with through the electronic media. Now it is up to the people in the local communities, particularly—

MR. ROE. What you are coming back and saying is that—again I am not being critical, we are trying to unfold the process here to see whether there is corrections or whatever can be made. What you are saying—correct me if I am wrong—is that your function as you are gathering the

data, it goes to the media to disseminate that information, is that correct?

MR. ANGELO. That is correct.

MR. ROE. Now, the question. Is there any other mechanism or institutional mechanism that gets to, a particular police department; in a given community, the health community; is there a flood group in a particular town; does it get to those people so it can be disseminated for somebody who doesn't look at television?

MR. ANGELO. Part of the network is tied to the emergency planning director of each county. He gets that information. It is then his responsibility to work an action plan to get that information down to the local levels where the people are, to take a responsive action.

MR. ROE. Let me ask the next question. Who establishes the local plans? Part of our problem is that we haven't had the facilities regretfully to be able to do that. So if you will forgive me, what I am trying to get at is that, without being critical, just to unfold this situation. You notify the media, then you came back and said well, the next step is that there is a local county officer or at least some agency that you notify there. How often is that updated? You don't have a flood like this every week. Is that a dynamic situation, or somebody just appointed by the county and says that is your job if it happens. How does that work? Who coordinates that?

MR. ANGELO. Well, I am not sure I know how it works at the local levels. I know that each community has its emergency planning director, each one has to have it. He must have an action plan on a countywide basis.

MR. ROE. Who approves the action plan, who establishes it?

MR. ANGELO. He establishes it. That is his responsibility as part of his job. He has no accountability.

MR. ROE. Again, how is the local county person assigned who does that? The commissioners, the board of freeholders?

MR. ANGELO. It is a political appointment by the county commission.

MR. ROE. Governing body?

MR. ANGELO. Yes, sir.

MR. ROE. From you knowledge?

MR. ANGELO. That is right. I am not sure who does it. A governing body that appoints—

MR. ROE. Do they update that information to you so you know who to contact? That is what I am trying to get at.

MR. ANGELO. We have a direct line that goes into their office.

MR. ROE. Let me try again. I have served at every level of government, including mayor of my community. I know what some of these problems can be. I am coming back and saying there is a process in the State of Pennsylvania and West Virginia that establishes these local contact points and is there somebody that coordinates that locally? What good is the Federal information if it is not put into the process where the people can benefit from it. Who checks the whole thing is what I am trying to get at.

MR. ANGELO. I don't know. I think we have the FEMA people here. Are they here? They are not here.

MR. ROE. I don't think—I don't want to belabor one of the earlier parts of the discussions. I would like to have hearings that first gets to the facts, No. 1; what happened, two; what are we going to do about it. So it seems to me that the information that we are eliciting so far seems to be void of a coordinated process.

Is that a reasonable point to make?

MR. ANGELO. Yes.

MR. CORSO. Mr. Chairman, if I may, it is the, as I understand it, the responsibility of the Federal Management Agency to work with the State and local officials to develop the emergency preparedness plans that you are talking about. It is our approach to connect into that system, in our case, the Federal Energy Regulatory Commission—connect into that system through its emergency action plans.

MR. ROE. Well, we have to depend on the fact that that system works. I am not applying the fault to be found here. What I hope to elicit before we finish, is that there will be additional people testifying from the State of Pennsylvania, and there is a local government panel that is going to testify.

We will ask those people would you keep this in mind. We want to know how the process works. There certainly is no value, in particularly this type of a situation where you have an extraordinary event that, for want of better phraseology, people had to be notified quickly to be able to respond to it. Is that a fair comment to make?

MR. ANGELO. That is true.

MR. ROE. So let's hold that further until we get to talk further with the officials from the State of Pennsylvania and from the local panel.

MR. MURPHY. It seems as though the National Weather Service now is blaming it on the news media. The news media didn't get the information out. The Corps of Engineers said it is up to the National Weather Service to get the information out. They just testified that it is your primary responsibility. Do you accept that?

MR. ANGELO. Yes, we do.

MR. MURPHY. Will you tell us then who in Fayette County, Washington County and Greene County you notified, and when and how you notified them; what news media you notified and when and how. Can you tell us that?

MR. ANGELO. I alluded to the times we issued our warnings. OK.

MR. MURPHY. You alluded to that, Mr. Angelo, but in the flood and warning service of region III hazard report they state that the National Weather Service issued flood watches on Sunday, November 3, into Monday morning for flooding of small streams in eastern West Virginia.

Now, you testified that you did not issue any notification until 4:40 p.m. on November 4, and I want to know at 8:40 p.m., if that was the first time you notified, who did you notify? When did you notify them and how did you notify them?

You know, if you put it on teletype, people don't have them in their homes, and maybe there is nobody at the local radio station at that hour of the night or nobody at a local newspaper. I want to know—I guess what everyone

wants to know is how did you assume your responsibilities? You told us it is your responsibility.

MR. ANGELO. Yes, sir.

MR. MURPHY. How did you carry that responsibility out?

MR. ANGELO. OK, let me say this: the small stream warnings are issued by the weather side of the National Weather Service; that is the meteorologist takes care of that area. We wish you had our flood warning based upon specific points along the river. That comes out of our section, the National Weather Service office. That clarifies that point.

MR. MURPHY. It does except I would then have to ask you why did it take you 24 hours from the time they issued small stream warnings until over 24 hours until you decided to issue a flood warning on the rivers.

MR. ANGELO. Because small stream flood is much less rainfall than major streams. So, when the small streams were being flooded, there was very significant less rainfall than when we had—than the basis upon which we issued our warnings. Is that clear?

Let me state it this way. The small streams would flood at maybe 1 inch or 1½ inches; the river, between 2 and 3 inches to flood. So—

MR. MURPHY. Except that you know from South Carolina to Rowlesburg the weather pattern.

MR. ANGELO. We did know the weather pattern, but in any event we would have to base a flood forecast based on forecasted rainfall, and that is one of the weakest links in

our operation is to try to forecast rainfall. It really can't be done.

If we start issuing flood forecasts based on forecasted rainfall, we are going to have more busts than success.

MR. MURPHY. Let get back to me get back to my other question then. You first notified someone at 8:40 p.m.

MR. ANGELO. Yes, sir.

MR. MURPHY. On the night of the 4th.

MR. ANGELO. Yes, sir.

MR. MURPHY. By 2 o'clock that morning. I think this building was already inundated on the 5th.

MR. ANGELO. Yes, sir.

MR. MURPHY. Six hours later.

During that, say, 6 hours, and the 8:40 p.m., do you have with you the records of who you notified, how you notified them, and when?

MR. ANGELO. No, I don't, sir.

MR. MURPHY. Will you provide that to the committee, because I think that is extremely important in finding out the chain so that we can hopefully improve that chain of information as the chairman pointed out to the people.

If some of them would have had 2 hours notification, they could have saved thousands of dollars' worth of their furniture and goods.

MR. ANGELO. I will provide that.

[The following was received from Mr. Angelo:]

SUBMISSIONS FROM MR. ANGELO
OMITTED FROM APPENDIX H

MR. CORSO. I have found in my files the notification times and persons for Greene County and Fayette County. I will furnish them.

MR. ROE. Let me suggest that.

MR. WISE. Would you yield? Out of curiosity, how do you get them? Do you have them and he doesn't.

MR. CORSO. I am speaking to the emergency action plan of the Federal Energy Regulatory Commission and the notification procedures they are under, not Weather Service responsibilities.

MR. ROE. Let me make a point at this stage of our hearing, ladies and gentlemen. Believe me, I understand the emotions that are involved much more than you may believe, because in my own State, I have suffered through many, many of these issues, and just as badly as you have.

However, what we are trying to do here today is a number of things. Let me just quickly state that, and we are fighting a time-frame. I want to be sure, most assured that the people who are affected by this situation get a chance to respond, and we don't have to leave without listening to the people. So I would admonish, if I may, with the greatest respect, our members.

We are unfolding the situation to try to be a little bit shorter, briefer, if you like, so we can get the chance to get the response from the people because I know there are other items people want to call to our attention. That is No. 1.

No. 2, I don't want to shut off this discussion here. We can provide the names and times—we would ask you to do that for the record, of course. We will do that, but then you will be staying in abeyance because I do want to get the

response from the west Pennsylvania people, and I want to be able to talk to the governmental—State government people here and country government people to see what process they have, and how we can lock this together.

I think one thing that is abundantly clear, without looking to pin blame or whatever, is that the process isn't working effectively. If the process were working effectively, then many of the people, as was said before, that have lost their belongings and so forth could have been warned sooner, could have been helped themselves more, rather than being caught in the situation that they were caught in. So, therefore, hold that open. Give us the information that the gentleman has requested, where you have it and so forth, because you are speaking from areas of responsibility. Then we will come back to this issue again when we have a change to discuss with the people of Pennsylvania State, of Pennsylvania and local government, as to how they are operating; how they see it operate, and where the holes may be during the improvement.

Are there any further questions of these witnesses at this moment? If not, we want to thank you very much for your input, gentlemen. If you would be kind enough to remain.

[Mr. Corso's prepared statement follows:]

H-32

TESTIMONY

OF

RONALD A. CORSO

DIRECTOR, DIVISION OF INSPECTIONS

OFFICE OF HYDROPOWER LICENSING

FEDERAL ENERGY REGULATORY COMMISSION

BEFORE THE

SUBCOMMITTEE ON WATER RESOURCES OF THE

COMMITTEE ON PUBLIC WORKS AND

TRANSPORTATION

U.S. HOUSE OF REPRESENTATIVES

February 7, 1986

Mr. Chairman and Members of the Subcommittee on Water Resources, I appreciate the opportunity to appear before you today on behalf of the Federal Energy Regulatory Commission (FERC) to testify on the devastating flood that occurred on the Monongahela and Cheat Rivers in early November 1985. My position with the FERC is Director, Division of Inspections, Office of Hydropower Licensing. I am responsible for supervising the Commission's dam safety program and post-license administration, which includes ensuring that Licensees properly construct, operate, and maintain licensed projects. The views expressed in my testimony are the views of the staff of the Division of Inspections, Office of Hydropower Licensing.

Pursuant to the authority granted by Congress under Section 4(e) of the Federal Power Act, the FERC licenses non-Federal hydroelectric projects, including the dams, reservoirs, powerhouses and all other appurtenant facilities. The FERC licensed the Lake Lynn Project, FERC Project No. 2459, in 1970 after a Supreme Court decision expanding the Commission's jurisdiction.

The Lake Lynn Project (Cheat Lake) was constructed in 1926. The Project consists of a dam 125 feet high impounding a reservoir with a surface area of 1,739 acres and a gross storage capacity of 72,300 acre-feet, a powerhouse with an installed capacity of 51,200 kilowatts, and appurtenant electrical and mechanical equipment. The dam includes a spillway, controlled by 26 tainter gates, for releasing flood flows. The project was built primarily for power production, but does provide other benefits such as recreation. The project has a small usable storage capacity of about 1,700 acre-feet per foot or 29,000 acre-ft. that is used to regulate stream flows principally for power production.

The Commission staff has reviewed hydrologic data and the project operation by the Licensee during the flood event of November 4 and 5, 1985. In summary, our review found that operation of the project was consistent with the license. We have independently confirmed that the Licensee did issue advance flood warnings in accordance with the procedures outlined in the Emergency Action Plan required by the Commission's Regulations.

In evaluating the operation of Lake Lynn Dam during this unusual flood event, it is important to note that the project was constructed for the primary purpose of generating hydroelectric power and that Lake Lynn has no storage capacity for flood control. Therefore, during periods of high flows, the dam must pass essentially all flood flows through the reservoir. In other words, while the project's operation does not of lower downstream flood levels, it likewise does not cause any increases in the flood levels.

During this particular flood event the Licensee, based on information telemetered from an upstream gaging station, operated the project powerhouse for most of Monday, November 4, 1985, at maximum hydraulic capacity. Although this is a less efficient operation for power production, it permitted the Licensee to discharge flows (about 9,000 cfs) through the powerhouse to predraw or lower the reservoir in anticipation of flood inflows. The reservoir was lowered from its normal operating water surface elevation of 870.0 feet to elevation 866.08 feet by 6:00 P.M. on November 4, 1985. This mode of operation is common and accepted practice in advance of a developing flood event to provide storage capacity to attenuate inflows. These early releases were made before the peak flows reached the project.

If the flood of November 1985 had been a normal event, lowering the reservoir could have had some effect on the flood flows. Due to the unprecedented magnitude of the flood, however, lowering Lake Lynn had virtually no effect on flood flows due to the small amount of storage space available. To put this in perspective, the available storage capacity of Lake Lynn between elevation 866.08 and the peak reservoir elevation of 876.5 feet experienced during the flood, is estimated to be about 17,000 acre-feet. In comparison, the flood volume has been estimated in excess of 300,000 acre-feet. Therefore, there was insufficient storage to affect peak flows significantly.

Our review of the project's operation shows that starting at 7:30 P.M. on Monday, November 4, 1985, the Licensee began opening spillway gates to release the high inflows to the reservoir. Throughout Monday night and continuing on Tuesday morning, the reservoir level rose to a peak elevation of 876.5 feet at approximately 10:30 A.M. This is the highest elevation ever recorded at Lake Lynn. The gates were gradually opened so as not to release large amounts of flow at one time and to provide for consistent control of the reservoir level. Although the gates were fully opened by early Tuesday morning, November 5, 1985, the reservoir continued to rise until the peak at 10:30 A.M. This indicates that until late Tuesday morning, inflow to the reservoir was exceeding outflow. Visual observations by operating personnel indicated that the reservoir level remained within 1 foot of the peak level until after 12:00 noon. If the Licensee had not opened all the spillway gates or if the gates were closed earlier, the reservoir would have reached even higher elevations and possibly would have caused overtopping of the dam thereby jeopardizing its

structural stability or causing debris to discharge over the dam.

Given the unprecedented magnitude of flood debris collected at the dam, it was not possible to prevent clogging of the spillway bays. Conventional methods for controlling debris, such as trash booms, are effective under normal conditions. It is questionable whether a trash boom would have been effective in this case due to the large amount of debris. In any event, flows released due to clogging of the spillway by debris occurred after the flood peak flows and do not appear to have contributed to the flooding downstream.

Part 12, Subpart C of the Commission's Regulations requires every applicant and licensee to develop and file an Emergency Action Plan (EAP). The EAP, which is developed in consultation and cooperation with appropriate Federal, state, and local emergency preparedness agencies, is intended to provide instructions and procedures to Licensee's personnel for providing early warning to upstream and downstream inhabitants, and other persons in the vicinity who might be affected by a project emergency. In this context, a project emergency is defined as an impending or actual sudden release of water at the project caused by natural disaster (flood), accident, or failure of the project works. The EAP for every licensed or exempted project is reviewed for adequancy by Commission staff, and constantly updated, as a result of mandatory annual reviews.

The Corps of Engineers at Lock and Dam No. 7 immediately downstream was notified by telephone prior to any gate operations at Lake Lynn and contact was maintained throughout the event. In addition, in accordance with the requirements of the EAP, both Fayette County

and Green County were notified late Monday evening and contact was maintained throughout the event. In response to our inquiries, both localities indicated they were satisfied with the coordination and notification given by the Licensee.

With respect to the Licensee's compliance with the Federal Power Act, the Commission has promulgated regulations (18 CFR Part 12) governing the safe operation of projects licensed by the Commission. In addition, the license for Project NO. 2459 includes Article 33 requiring that project operation ensure that flood flows released by the project are no greater than would have existed without the project. Our review of the project's operation during the November 1985 flood found that the Licensee complied with the Commission's Regulations and its license.

Pursuant to the Federal Power Act and the Commission's Regulations, the Corps of Engineers is consulted by the Commission on the flood control potential of a project proposed for license, the project's impact on existing flood control measures, and whether flood control should be a project purpose. The Corps recommendations on these projects may be incorporated into the project license by the Commission.

Accordingly, for large hydroelectric projects that may have significant flood control potential, this potential, is established and coordinated with any existing Federal flood control projects. For smaller projects without appreciable flood control capability, the Commission ensures that the project will not detrimentally affect existing flood control projects or aggravate flood conditions. In other words, inflow entering the project reservoir must be equal to the releases made at the project dams. This is stated in the license by special articles requiring that the Licensee

shall not release from the project, during flood periods, flows that would exceed those which would have occurred in the absence of the project.

Since the Lake Lynn Project has no appreciable flood control capability, the license required in Article 33 that flows released from the project not exceed flows that would have occurred without the project.

This concludes my testimony.

APPENDIX I

USE OF A RENEWABLE RESOURCE
WATER POWER

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REGULATORY COMMISSION

USE OF A RENEWABLE RESOURCE

Falling water in streams and rivers has been harnessed to produce electric energy for over 100 years. As it falls, the water passes through turbines which turn to generate electricity.

In 1920, hydroelectric power comprised about 30 percent of the nation's generating capacity, and 40 percent of the energy supplied by electric systems. As fossil fuels came to be relied on more and more, however, and as many of the best sites for hydro were developed, the relative contribution of hydro to the nation's capacity decreased to 20 percent in the early 1960's and to 12 percent in 1983. The percentage contribution of energy decreased to 20 and 15 during the same periods.

Although the relative contribution has decreased, hydroelectric development itself has steadily increased in the U.S. from 4,800 megawatts in 1920 to 33,300 megawatts in 1960 and to 80,300 megawatts in 1983.

Hydroelectric plants depend upon water, which is a renewable resource because of the recurring cycles of rainfall, runoff, and evaporation. Hydroelectric plants do not consume water, heat the water in streams, or contribute to air pollution. These favorable characteristics make hydroelectric power an attractive source of electric power generation.

HISTORY OF HYDROPOWER REGULATION

Before passage of the Federal Water Power Act in 1920, a special act of Congress was needed to build and operate a hydroelectric power project on navigable streams or lands of the United States. Congress first authorized construction of a hydroelectric plant in 1884. Demand for

electric power suddenly increased during World War I, and the need for an orderly means of advancing water power development became pronounced.

To meet this need, Congress, in 1920, enacted the Federal Water Power Act which established the Federal Power Commission (FPC). The FPC was given the responsibility of licensing non-Federal hydroelectric power projects which affect navigable waters, occupy U.S. public lands, use water or water power at a government dam, or affect the interests of interstate commerce. The Act also required the FPC to license projects that were "best adapted to a comprehensive plan for improving or developing a waterway or waterways."

In its first 2 years, the FPC received 321 applications involving the construction of about 15,000 megawatts of new generating capacity, more than three times the capacity of then-existing water power installations in the U.S. In 1935, the Federal Water Power Act was incorporated into the Federal Power Act, which extended the FPC's authority to regulate the interstate aspects of the electric power industry.

Hydroelectric projects built by the U.S. Government are authorized by Congress and do not require Commission licenses. Most Federal water projects are multi-purpose projects which serve other primary purposes besides generating electric power, such as navigation, flood control, recreation, and irrigation. Most authorizations for power at Federal dams require the Federal constructing agencies to seek comments and recommendations from the Commission. Where power is not authorized at such dams by Congress, the Commission is authorized to license power facilities.

The FPC ceased to exist when the Department of Energy was activated on October 1, 1977. The Federal Energy Regulatory Commission (FERC) now carries on most of the former FPC's functions, including its licensing of non-Federal hydroelectric power projects.

FERC's ROLE

The FERC issues preliminary permits for the study of hydroelectric power sites and issues licenses for such projects for periods of up to 50 years. In addition to safety and engineering requirements, the Commission often adds special license provisions on flood control, navigation, soil erosion, water quality, municipal water supply, minimum flow, recreation, protection of visual quality and archaeological and historical sites, and protection of fish and wildlife. Exemptions from licensing are also issued for hydroelectric projects having installed capacities of 5 megawatts or less.

When a privately owned utility's project license expires, the Commission may issue a new license to the original licensee or to a new licensee, or it may recommend takeover by the U.S. when it determines this would serve the public interest. Licensed publicly owned projects are not subject to Federal takeover. If a Federal agency recommends takeover of a project, the Commission postpones its decision for 2 years to provide time for Congress to consider the takeover recommendation.

CURRENT DEVELOPMENT

Approximately 1,600 hydroelectric power plants were operating in the U.S. as of January 1, 1984, with 66,800 megawatts of conventional generating capacity and 13,500 megawatts of pumped storage capacity. Approximately 46

percent of this capacity is Federally owned, 33 percent privately owned, and 21 percent non-Federal publicly owned. About 93 percent of the non-Federal capacity operates under about 900 Commission licenses.

Forty-seven states have hydroelectric power projects in operation, the exceptions being Delaware, Louisiana, and Mississippi. Almost half of the nation's total hydroelectric capacity exists in Washington, Oregon, and California.

The largest privately owned conventional hydropower project currently in operation is Susquehanna Power Company's Conowingo project on the Susquehanna River near Conowingo, Maryland, with 476.7 megawatts of generating capacity. The largest non-Federal publicly owned conventional project is the Power Authority of the State of New York's Robert Moses project at Niagara Falls, New York, with 1,950 megawatts of capacity.

The largest conventional hydro project owned by the U.S. Government is the Grand Coulee project on the Columbia River near Coulee Dam, Washington, with a capacity of 6,180 megawatts.

Total investment in a new hydroelectric plant varies greatly due to size, location, type, land costs, and costs of relocating highways, railroads, and other facilities. Investment costs per kilowatt for conventional hydroelectric plants may or may not be higher than for steam-electric plants, depending on site characteristics. Production expenses, however, are much lower because no fuel is required, and operation and maintenance costs are much less.

Approximately 300 applications to build new major hydro projects over 2,000 horsepower were pending at the

FERC as of January 1, 1984. These applications together involve more than 6,800 megawatts of new capacity. Also pending at the FERC were outstanding preliminary permits and applications for preliminary permits to study the feasibility of installing about 20,400 megawatts of new capacity. The cost of all these potential developments in total is estimated at $26 billion.

PUMPED STORAGE

Hydroelectric power plants are particularly well suited for generating power when demand for electricity is high and for providing reserve capacity to complement the output of large fossil-fueled and nuclear steam-electric plants. Pumped storage hydroelectric projects are uniquely suited for these purposes. Like conventional developments, pumped storage projects use falling water to generate power. They differ, however, from conventional hydroelectric projects in that the water is returned by pumping to an upper reservoir during off-peak periods, where it is stored for release to generate power during peak periods.

Pumped storage projects are particularly effective at sites having high heads (large elevation differences). The Helms project in California has the highest head of current pumped storage projects in the United States, approximately 1,630 feet.

The largest privately owned pumped storage project currently in operation is Consumers Power Company's Ludington project on Lake Michigan near Ludington, Mich., with 1,872 megawatts of generating capacity. The largest non-Federal publicly owned pumped storage project is California Department of Water Resources' and Los Angeles Department of Water Power's Castaic plant located off the California Aqueduct, with 1,200 megawatts

of capacity. The largest Federal pumped storage project is the 1,530-megawatt Raccoon Mountain project on the Tennessee River in Tennessee. This plant is owned by the Tennessee Valley Authority.

The Virginia Electric and Power Company has nearly completed (95%) the largest pumped storage project in the world. VEPCO's 2,100-megawatt Bath County pumped storage project is located on Back Creek and Little Back Creek near Mountain Groves, Va., and will cost an estimated $1.7 billion. The project is expected to commence commercial operation in 1985.

DAM SAFETY

The Commission's staff supervises the construction and operation of licensed projects to ensure that all license conditions are being met, with an emphasis on dam safety. Certain safety conditions are also required for exempted projects. Licensed projects are inspected monthly while under construction, and designs, plans, and specifications of dams, powerhouses, and other structures are reviewed and approved prior to start of construction.

After licensed projects begin operating, they are inspected annually to assess their structural integrity, to ensure that they are properly maintained, and to ensure that license conditions regarding reservoir levels, discharges, recreational developments, and fish and wildlife and other environmental requirements are being met. Projects with dams higher than 10 meters (32.8 feet), or with total storage capacity of more than 2,000 acre-feet (2.5 million cubic meters), must also be inspected once every 5 years by a qualified independent engineering consultant.

The Commission has also required all licensees to prepare emergency action plans that are designed to provide an early warning system if there is a sudden release of water due to a dam failure or an accident to the dam. The emergency action plans are required to include operational procedures that may be used in such an event, such as reducing reservoir levels, reducing downstream flows, and procedures for notifying nearby residents and also appropriate officials.

ENVIRONMENTAL PROTECTION RECREATION

An application to build a hydroelectric power project must include an evironmental report describing the effect the project would have on geology, soils, water quality, fish, wildlife, and botanical resources, visual quality, historical and archeological resources, recreation, land use, and socioeconomic values. Licenses issued by the Commission contain conditions for the protection and enhancement of these resources.

Another important part of a license application and of any license subsequently issued by the Commission is a recreational use plan for project waters and adjacent lands. Licensees have reported an estimated 102 million recreation-days use annually at hydroelectric projects in such activities as fishing, boating, swimming, picnicking, camping, hiking, sightseeing, hunting, and guided tours of the generating facilities.

SMALL DAMS

The U.S. Government is actively encouraging the development of small dam sites throughout the nation for electric generation. The Army Corps of Engineers conducted the National Hydroelectric Power Resources Study

which found that a total of 46,075 megawatts of generating capacity could be developed at existing dam sites. The greater potential was found to exist in the Northwest followed by the Southwest and Northeast, respectively.

POWER SITE LANDS

In order to protect potential power sites for future power development, the Federal Power Act provides that public lands included within project boundaries of applications filed for preliminary permits or licenses are automatically reserved (withdrawn) for power purposes until otherwise directed by the Commission or by Congress. The withdrawal of these lands together with lands reserved for power purposes by Presidential or Department of the Interior directives help insure that these renewable hydropower resources will not be precluded from development.

Approximately 13.4 million acres of United States lands are presently reserved for water power purposes. Where it is determined that such lands have no power value or that certain uses would not destroy the lands for future power, the Commission may vacate the withdrawals and restore the public lands.

For further information contact:

Division of Public Affairs
Federal Energy Regulatory Comm
825 N Capitol St, NE, Rm 9200
Washington, DC 20426
Phone: (202) 357-8055

Single copies of this booklet are available from:

January 1985

PLEASE BRING THIS DRAFT TO THE ANNUAL MEETING

As of the date of publication, this Draft has not been considered by the members of the American Law Institute and does not represent the position of the Institute on any of the issues with which it deals. The action, if any, taken by the members with respect to this Draft may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each Annual Meeting.

The American Law Institute

Report
(March 31, 1987)

PRELIMINARY STUDY OF COMPLEX LITIGATION

Subjects Covered:

Submitted by the Council to the Members
of The American Law Institute
for Discussion at the Sixty-fourth Annual Meeting
on May 19, 20, 21, and 22, 1987

The Executive Office
THE AMERICAN LAW INSTITUTE
4025 CHESTNUT STREET
PHILADELPHIA, PA. 19104

B. Section 1407 Transfer and Consolidation

Consolidation of multidistrict litigation pursuant to Section 1407 of the United States Judicial Code also has been used with considerable success to address the problems of multiparty, multiforum litigation. Section 1407 authorizes the Judicial Panel on Multidistrict Litigation to transfer related lawsuits pending in different federal district courts to a single district judge for pretrial proceedings. The transferee judge, who is empowered to rule on all pretrial motions, then frequently transfers the action to himself or herself for trial pursuant to the change of venue provisions of Section 1404, provided that venue and jurisdiction are proper in the transferee district. After transfer for trial, the transferee judge may consolidate all or parts of the transferred cases into one or several actions under Federal Rule of Civil Procedure 42(a) for the determination of common questions. If individual issues cannot be tried in this manner, the cases may be bifurcated and either severed or remanded for determination of individual questions such as specific causation and damages. Experience has shown that most actions consolidated under Section 1407 are not returned to the transferor forums, primarily because of the frequency of settlement.[43]

The procedures for transferring and consolidating cases are relatively straightforward. The Judicial Panel may consolidate cases on its own initiative, or upon the

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[43]See Howard, A Guide to Multidistrict Litigation, 75 F.R.D. 577, 578 (1977) (noting that the vast majority of cases handled by the panel conclude prior to remand, and that the infrequency of remand "indicate[s] the great success of the transferee judges in terminating by settlement, summary judgment or other type of dismissal"). See also Comment, The Experience of Transferee Courts Under the Multidistrict Litigation Act, 39 U. Chi. L. Rev. 588, 600 n.70 (1972) (listing cases in which settlement has been reached in transferee courts).

application of one or more parties,[44] subject only to the parties' rights to show why transfer should not occur.[45] The district court originally entertaining the action also may initiate consolidation proceedings. Similarly, the transferee judge may act sua sponte under Section 1404 and Rule 42(a), although again the parties are entitled to oppose transfer or consolidation. Subsequent related suits may be transferred under Section 1407 as tag-alongs.[46]

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[44]See 28 U.S.C. § 1407.

[45]See R.Pr.J.P.M.D.L. 8, 9, 13, 14, 89 F.R.D. 273, 278-79, 283-84. See also In re Galveston, Texas Oil Well Platform Disaster Litigation, 322 F.Supp. 1405 (J.P.M.D.L. 1971) (transfer denied when all plaintiffs opposed and when pretrial procedures of affected actions had been proceeding satisfactorily); In re Sta-Power Industries Securities Antitrust Litigation, 372 F.Supp. 1398 (J.P.M.D.L. 1974) (cases transferred over objections of some plaintiffs that they were not included in service list, on ground that objecting plaintiffs had received actual notice of hearing and could demonstrate no prejudice); In re Multidistrict Private Civil Treble Damage Litigation Involving Library Editions of Children's Books, 299 F.Supp. 1139 (J.P.M.D.L. 1969) (factors to be considered in determining propriety of transfer where defendant not served with process include (1) presence or absence of good faith in plaintiff's efforts to effect service; (2) extent of plaintiff's efforts to effect service; (3) degree to which unserved defendant's interests coincide with those of other defendants before panel; (4) number of unserved defendants; and (5) importance of presence of unserved defendants to Panel's transfer decision. See generally 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters 2d § 3865 (1986).

[46]See R.Pr.J.P.M.D.L. 1, 9, 10, 89 F.R.D. at 278-79. The Panel's Rule 1 defines a "tag along" case as a "civil action involving common questions of fact with actions previously transferred under Section 1407." 89 F.R.D. at 274. See also, In re Midwest Milk Monopolization Litigation, 398 F.Supp. 676 (J.P.M.D.L. 1975) (tag-along cases consolidated although they involved different markets). See generally 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters 2d § 3865, pp. 359-61 (1986).

Section 1407 centralization has several desirable qualities. As noted above, the procedures are simple. In addition, transfer and consolidation for pretrial proceedings is mandatory upon the parties, while the Panel has discretion as to which lawsuits to transfer and where they should be lodged.[47] Also, transferee judges, many of whom have become expert in handling consolidated cases, have considerable discretion to structure and coordinate the cases once they have been transferred.[48]

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[47]Section 1407 establishes three statutory criteria governing the Panel's exercise of its transfer authority. Transferred cases must involve "one or more common questions of fact," the transfer must be "for the convenience of the parties and witnesses," and it must "promote the just and efficient conduct of such actions." A number of commentators have observed that, in practice, the last criterion seems to subsume the other two and the Panel's decisions whether or not to transfer ultimately depend upon its calculation of whether transfer will promote efficient treatment of the litigation. See, e.g., Marcus, Conflicts Among Circuits and Transfers Within the Federal System, 93 Yale L. J. 677, 681 (1984); Herndon & Higginbotham, Complex Multidistrict Litigation—An Overview of 28 U.S.C. Sec. 1407, 31 Baylor L. Rev. 33 (1979) ("Doubt is generallyresolved in favor of transfer. . . . "); Herndon, Section 1407 and Antitrust Multidistrict Litigation—The First Decade, 47 Antitrust L. J. 1161, 1169-71 (1979) ("The panel's decisions have virtually eliminated the requirement that transfer 'will be for the convenience of the parties and witnesses'. . . . Clearly the most crucial element . . . is whether multidistrict handling 'will promote the just and efficient conduct of the action.'"); Note, The Judicial Panel and the Conduct of Multidistrict Litigation, 87 Harv. L. Rev. 1001, 1011 (1974) ("Once a threshold level of potential savings is found, transfer is almost inevitable."); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters 2d § 3863 (1986) (citing cases).

[48]The transferee judge, in effect, acts as both transferor and transferee with respect to Section 1404. See 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters 2d § 3866, pp. 619-22 (1986). With respect to the transferee judge's discretion under Rule 42, see Note, Consolidation and Transfer in the Federal Courts: 28 U.S.C. Section 1407 Viewed in Light of Rule 42(a) and 28 U.S.C. Section 1404(a), 22 Hastings L.J. 1289, 1290-94 (1971).

The effect of Section 1407 is significant even when the transferee judge does not transfer the cases to him or herself for trial under Section 1404. The transferee judge decides all pretrial motions, including class certification and summary judgment motions, and supervises discovery.[49] The transferee judge also oversees class actions and pretrial class settlements when the case is certified under Rule 23.[50] Since many cases settle before trial, the transferee judge's pretrial decisions often effectively are dispositive of the merits. Moreover, when cases are transferred and consolidated for trial in addition to pretrial, waste and duplication of efforts often can be further reduced.[51]

Nevertheless, Section 1407 centralization rarely works as well in practice as it theoretically might. The procedures under that statute, the Section 1404 and Section 1406 trial transfer provisions, and Rule 42(a) were developed separately and were not designed to be used together in the above-described manner. Thus, the combination often is clumsy. Problems also are created by the fact that cases come to the Judicial Panel in very different stages of development. New cases often are filed after the initial group is well into pretrial, or even has been resolved finally, in the

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[49]See Carsey v. Pan American World Airways, 66 F.R.D. 392 (E.D. Va. 1975) (denying class certification on ground that multidistrict treatment of discovery would be preferable); Yandle v. PPG Industries, 65 F.R.D. 566 (E.D. Tex. 1974) (same). See also In re Data General Corp. Antitrust Litigation, 470 F.Supp. 1225 (J.P.M.D.L. 1979).

[50]See, e.g., In re "Agent Orange" Products Liability Litigation, 597 F.Supp. 740 (E.D.N.Y. 1984).

[51]The 1985 Annual Report of the Panel notes that although transfer may increase the workload in some districts, "[t]he burden imposed on the courts by the coordination or consolidation of actions for pretrial proceedings under Section 1407 is ... less than that imposed by separate handling in different districts of a like number of related cases." Annual Report of The Judicial Panel on Multidistrict Litigation 1, 17 (Sept. 1985).

transferee court. This timing problem often causes unnecessary litigation, slows the movement of the preceeding, and consumes the judicial system's resources. Tag-along procedures are able only partly to ameliorate this problem.

Moreover, the Section 1407 procedure cannot reach actions in state courts unless they are first removed to federal court. Even at its best, therefore, this device in its current form can deal only with horizontal claim dispersion within the federal courts. Neither dispersion among state courts, nor between state and federal courts, is affected.[52] Even when cases have been successfully and timely consolidated for pretrial, a number of difficulties remain. The transferee judge may transfer to him or herself for trial only those cases in which venue as well as personal and subject matter jurisdiction are proper, although in some contexts the consent of the parties to venue and personal jurisdiction will ameliorate this difficulty.[53] Thus venue and jurisdictional requirements may prevent complete unitary treatment, leaving some pieces of the litigation to continue on an individual basis.[54]

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[52]See Weinstein, Preliminary Reflections on the Law's Reaction to Disasters, 11 Col. J. Env. L. 1, 23 (1986) (suggesting that Congress, under the Commerce Clause, has the power to transfer state cases arising from mass tort disasters, on the ground that "in disasters of this size and nature, national issues predominate"). Consolidation of cases lodged in state courts is considered in Chapter Six.

[53]See In re Alien Children Education Litigation, 501 F.Supp. 544, 551 (S.D. Tex. 1980) (waiver of objections to venue). In general, however, it cannot be expected that parties will waive these objections on a regular basis. See generally 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters 2d §§ 3866, 3867 (1986).

[54]A proposal has been introduced in Congress that would expand multidistrict litigation to allow consolidation for trial as well as pretrial matters. See H.R. 4159, 98th Cong., 1st Sess. (1983) (introduced by Rep.

(Continued on next page)

Moreover, consolidation of a large number of cases under Rule 42(a) often is difficult to administer successfully. Effective consolidation will depend on the transferee court's ability to ensure that "[p]ower to speak for each side . . . [is] concentrated in the hands of one or at most a few persons."[55] This task is not always a simple one.[56] Moreover, the authority of liaison counsel appointed for pretrial is limited almost exclusively to administrative matters.[57] Lead counsel with greater powers may be appointed for trial, but other parties must be allowed to conduct their own examination of witnesses, present evidence, and make their own arguments.[58] Much depends on the ability or willingness of counsel to cooperate.[59] Moreover, there are powerful incentives for parties and their

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(Continued)
Kastenmeier). See also Weinstein, Preliminary Reflections on the Law's Reaction to Disasters, 11 Col. J. Env. L. 1, 23 n.58 (1986).

[55]Weinstein, supra at 16 (observing need for consolidation in mass tort disputes).

[56]See Manual 2d, § 20.224 (noting that court should assure that attorneys it selects or approves possess "the resources, the commitment and the ability to accomplish the assigned tasks," and should consider the attorneys' ability to command respect of their colleagues, their prior litigation experience, and the possible bias inherent in plans proposed by counsel who will be affected by the court's decision). See also In re Fine Paper Antitrust Litigation, 98 F.R.D. 48 (E.D. Pa. 1983), aff'd in part and rev'd in part, 751 F.2d 562 (3d Cir. 1984) (reducing fee awards called for by plan submitted by class action counsel).

[57]Id. § 20.221-22.

[58]See, e.g., Dupont v. Southern Pacific Co., 366 F.2d 193 (5th Cir. 1966).

[59]For a discussion of cooperation efforts that have succeeded, see Weinstein, Preliminary Reflections on the Law's Reaction to Disasters, 11 Col. J. Env. L. 1, 30 n.92 (1986).

counsel to contest or refuse to cooperate with appointed lead or liaison counsel.[60]

Despite the limitations on Section 1407 practice, it represents one of the most important currently available techniques for dealing with complex litigation. This is true both because of the practical results that have been achieved in innumerable cases through its use and because of the innovation and creativity that have been manifested by the federal judges who have sat as transferee judges.[61] As will be seen later in this Preliminary Study, many possibilities for future improvement build on the foundation provided by Section 1407 and the work of the Judicial Panel on Multidistrict Litigation.

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[60]Attorneys generally are reluctant to relinquish control over "their" cases. Lead counsel may take decisions opposed to the judgment of the attorney, may steal an attorney's "thunder," and may reduce his or her fee, either by billing for services performed or by reducing the amount that the attorney collects from any award. Attorneys intent on protecting "their" cases can do so under the current procedure by refusing to cooperate in appointing lead counsel at pretrial, presenting their own evidence, witnesses, and arguments at trial, and conducting their own direct and cross-examination of witnesses. Judges can prevent such activity only if it is repetitious. See In re Gabel, 350 F.Supp. 624 (C.D. Cal. 1972) (Hall, J.) (appointment of lead counsel necessitated when it had become "impracticable to prepare for and try this case on the issue of liability with so many counsel participating in a consolidated trial"). See generally Goodbody, Complex and Multidistrict Litigation, 3 Class Act. Rep. 71, 73-74 (1974); Manual, §§ 1.90-1.93; Manual 2d, §§ 20.2-20.23.

[61]*See* Harris, Consolidation and Transfer in the Federal Courts: 28 U.S.C. Section 1407 Viewed in Light of Rule 42(a) and 28 U.S.C. Section 1404(a), 22 Hastings L. Rev. 1289 (1971).

No. 88-7 (3)

In the Supreme Court of the United States

October Term, 1988

WEST PENN POWER COMPANY, a corporation,
Defendant-Petitioner,

v.

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR,
A Partnership and as Representative of a Class,
Plaintiffs-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPERIOR COURT

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QUESTION PRESENTED FOR REVIEW

Does Section 317 of the Federal Power Act, 16 U.S.C. §825p (1982), pre-empt state law claims for negligence and operation of a dangerous instrumentality asserted in state court against the private owner of a federally licensed hydroelectric power dam?

LIST OF ALL PARTIES

The parties in the Superior Court of Pennsylvania were:

John H. Engle, William R. Engle, William C. Engle, t/d/b/a Engle's Holiday Harbor, a Partnership and as Representative of a Class, Appellee; Plaintiffs in the Court of Common Pleas of Washington County, Pennsylvania

and

West Penn Power Company, Appellant; Defendant in the Court of Common Pleas of Washington County, Pennsylvania.

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OPINIONS BELOW AND JURISDICTION

Respondents are satisfied with Petitioner's presentation of the opinion below and grounds on which it seeks to invoke the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

Respondents are satisfied with Petitioner's statement of the statutory provisions involved.

STATEMENT OF THE CASE

Respondents, John H. Engle, William R. Engle, and William C. Engle, t/d/b/a Engle's Holiday Harbor, filed a class action Complaint in November 1985 against West Penn Power Company in the Court of Common Pleas of Washington County, Pennsylvania. The Complaint alleged that Respondents (hereinafter "Plaintiffs") had suffered property damage in connection with the allegedly negligent release of waters from the Lake Lynn Dam, owned and operated by Petitioner West Penn Power Company (hereinafter "Defendant"). In addition to the negligence claim, the Complaint also alleged a claim for operation of a dangerous instrumentality. No federal claims were alleged in the Complaint.

Defendant West Penn Power Company removed this action to the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. §1441 (1982 & Supp. 1986). Defendant argued that removal was proper because the federal court had "exclusive jurisdiction" pursuant to Sections 10(c) and 317 of the Federal Power Act, codified at 16 U.S.C. §803(c) (1982 & Supp. 1986) and §825p (1982), respectively.

The United States District Court for the Western District of Pennsylvania granted Plaintiffs' Motion to Remand, holding that Defendant's "exclusivity" argument was asserted as a defense and did not provide a basis for removal. *Engle v. West Penn Power Company*, No. 85-2924, mem. op. at 5 (W.D. Pa. March 13, 1986). The District Court held that Plaintiffs' Complaint stated prima facie claims arising under state law, which did not lose their validity because of the existence of the Federal Power Act, 16 U.S.C. §791(a), *et seq.* (1982). *Id.* at 6.

The District Court stated that, in remanding the case, it had made no determination on the merits of Defendant's contention that Plaintiffs' claims were within the exclusive jurisdiction of the federal courts and were, therefore, totally pre-empted by federal law. *Id.* at 7. The District Court noted, however, that "the Federal Power Act, unlike the Labor Management Relations Act, is not an area in which the extent of federal primacy is well established and in which it is clear that all state law has been displaced." *Id.* at 6 (citing *Cleveland Electric Illuminating Co. v. City of Cleveland,* 50 Ohio App. 2d 275, 363 N.E.2d 759 (1976); *Airco Alloys Division, Arco, Inc. v. Niagara Mohawk Power Corp.*, 65 A.D.2d 378, 411 N.Y.S.2d 460 (1978)).

On remand, Defendant filed Preliminary Objections in the Court of Common Pleas of Washington County raising the argument that the state courts of Pennsylvania lacked jurisdiction over Plaintiffs' state law claims because the federal courts had "exclusive jurisdiction" over Plaintiffs' state law claims.

The Court of Common Pleas of Washington County dismissed Defendant's Preliminary Objections, holding that Plaintiffs' state law negligence claims were not pre-empted by the Federal Power Act. *Engle v. West Penn Power Co.,* No. 271 Nov. Term 1985 A.D., slip op. (Court of Common Pleas of Washington County, Pa., August 4, 1986). The Superior Court affirmed.[1] The Supreme Court of Pennsylvania refused Defendant's Petition for Allowance of Appeal. *Engle v. West Penn Power Co.,* No. 450 W.D. Allocatur Docket 1987 (April 11, 1987). Defendant then filed a Petition for a Writ of Certiorari in this Court.

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[1]The Opinion of the Superior Court of Pennsylvania is reported at 366 Pa. Super. Ct. 104, 530 A.2d 913 (1987), and in the Appendix to Defendant's Petition at B-1.

SUMMARY OF ARGUMENT

There are two grounds for denying the Petition for Writ of Certiorari.

First, there is no authority for the proposition advanced by West Penn Power Company that Section 317 of the Federal Power Act, 16 U.S.C. §825p (1982), pre-empts state common law actions for property damage caused by private owners of hydroelectric dams licensed by the Federal Energy Regulating Commission ("FERC") pursuant to the Federal Power Act. The legislative history of the Federal Power Act and decisions of this and other courts interpreting the Act are devoid of any such implication. The courts have consistently upheld the exercise of traditional police powers of the states against pre-emption challenges.

In construing the Federal Power Act, federal pre-emption of state law has been limited to two areas: 1) regulation of wholesale interstate rates for electricity; and 2) the licensing power of the Federal Energy Regulatory Commission. This case raises no issues which touch on, directly or indirectly, federally pre-empted areas. Because of this, no question of national significance is raised by the issues in this case.

Second, the language contained in 16 U.S.C. §825p (1982) providing for "exclusive jurisdiction" in the federal courts is limited to actions alleging violations of the Federal Power Act. This language does not divest the state courts of subject matter jurisdiction with respect to common law negligence actions or actions brought under other state theories.

ARGUMENT

I. THE FEDERAL POWER ACT DOES NOT PRE-EMPT STATE LAW CAUSES OF ACTION FOR PROPERTY DAMAGE

A. West Penn Power Company Has Conceded That The Federal Power Act Does Not Pre-empt State Law Causes Of Action

Defendant West Penn Power Company's position is confusing and internally contradictory. While apparently arguing for "exclusivity" or pre-emption, West Penn Power Company concedes that the Federal Power Act does not pre-empt state law tort actions. *See* Petition for Writ of Certiorari, §I.C. at 15 (hereinafter "Petition").[2] Despite West Penn Power Company's explicit admission that it is not advocating pre-emption of federal law, West Penn Power Company cites this Court to pre-emption cases. *See Petition,* at 15-17 ("Thus, although the petitioner *does not claim pre-emption here,* the following cases are cited merely to show *the possible negative effect* of state court involvement in the federal regulatory scheme.") (emphasis supplied). This internally inconsistent position makes Defendant's arguments difficult to comprehend and address.

Although West Penn Power Company's Petition concedes that the Federal Power Act does not pre-empt state law tort claims, Plaintiffs are obliged to address the other arguments raised by Defendant.

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[2]Plaintiffs here note the inclusion of Appendices G-J in Defendant's Appendix. The inclusion of these documents and the references to them in Defendant's Petition are improper because they were not a part of the record before the Superior Court.

B. Exclusivity And Pre-emption Are Not Interchangeable Concepts

Defendant has mistakenly interchanged the concepts of pre-emption and exclusive jurisdiction. Exclusivity and pre-emption are distinct and different concepts. They are not interchangeable.

> Federal pre-emption . . . should be distinguished from exclusive federal jurisdiction. As to the former, federal substantive law supplants or pre-empts state law, but unless federal jurisdiction is made exclusive both state and federal courts have concurrent jurisdiction of actions arising under the law. Federal instrumentalities may, of course, be given exclusive jurisdiction and in that event only those instrumentalities have jurisdiction of the matter, irrespective of the law to be applied.

1A J. Moore, B. Ringle, J. Wicker & J. Lucas, *Moore's Federal Practice*, ¶0.160, at 189 (2d ed. 1987 & Supp. 1987-88). Notwithstanding statements to the contrary in Section I.C. of the Petition, West Penn Power Company appears to be arguing for both pre-emption and exclusivity in Sections I.A. and B. of its Petition. Clearly, Congress could not mandate that otherwise valid state law causes of action be brought in federal court in the absence of pre-emption. Defendant cites no authority which holds that the Federal Power Act pre-empts state law tort actions for property damage.

II. THE PLAIN LANGUAGE OF SECTION 825p OF THE FEDERAL POWER ACT SIMPLY PROVIDES FOR EXCLUSIVE JURISDICTION IN FEDERAL COURTS FOR ACTIONS BROUGHT UNDER THE FEDERAL POWER ACT

Section 825p of the Federal Power Act provides that:

> The District Courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of *violations of this chapter or the rules, regulations and orders thereunder,* and of all suits in equity and actions at law brought to enforce *any liability or duty* created by, or to enjoin any violation of, this *chapter or any rule, regulation, or order thereunder.*

16 U.S.C. §825p (1982) (emphasis added).

Section 825p does not state that the federal courts shall have exclusive jurisdiction of all actions brought against any federally licensed hydroelectric power dam. Section 825p is directed to actions brought to redress *violations of Chapter 12* of the Federal Power Act, the rules, regulations or orders of the Federal Energy Regulatory Commission ("FERC"), and all actions to enforce or enjoin liabilities or duties created by *Chapter 12 of the Federal Power Act.*

Plaintiffs did not bring this action under the Federal Power Act. There are no federal claims pleaded in Plaintiffs' Complaint. Plaintiffs have brought only common law state law claims in the courts of the Commonwealth of Pennsylvania. Section 825p of the Federal Power Act thus has no application to this lawsuit.

A. The Areas Of Federal Power Act Pre-Emption Have Been Clearly Established

The areas in which the Federal Power Act pre-empts state law are twofold. First, states may not, directly or indirectly, interfere with the authority of the Federal Energy Regulatory Commission ("FERC") in setting wholesale rates and in regulating agreements that affect wholesale rates of electricity. *Mississippi Power & Light Company v. Mississippi,* ____ U.S. ____, 108 S.Ct. 2428, 2349 (1988); *Nahantala Power & Light Company v. Thornburg,* 476 U.S. 953, 963 (1986). This area of federal pre-emption has been exhaustively treated by the courts and has no application to this action.

In addition to pre-empting a state's ability to regulate or affect wholesale rates for electricity, the Federal Power Act has been interpreted to pre-empt state laws that require a state license as a predicate for building a hydroelectric power dam, because states could, in effect, thus exercise veto power over hydroelectric development by refusing to grant a license. *See First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 U.S. 152, 177 (1946); *Oregon v. Idaho Power Co.,* 211 Or. 906, 312 P.2d 583, 586 (1957); *City of Tacoma v. Taxpayers of Tacoma,* 43 Wash. 2d 468, 262 P.2d 214 (1953).

In contrast, state law regarding proprietary rights in water is expressly saved. *Federal Power Commission v. Niagara Mohawk Power Corporation,* 347 U.S. 239, 252 (1954); *Henry Ford & Son, Inc. v. Little Falls Fibre Co.,* 280 U.S. 369, 379 (1930).

Contrary to Defendant's assertions, the United States Supreme Court has recognized the system of "dual authority" embodied in the Federal Water Power Act. *First Iowa,*

328 U.S. at 167-68. The Supreme Court elucidated this "dual authority" created by the Act as separating the issues of hydropower development into separate jurisdictions, state and federal. *Id.* The Court adhered to this interpretation in *California v. United States*, 438 U.S. 645 (1978), noting that the Reclamation Act of 1902,[3] like the Federal Water Power Act of 1920, was enacted with the specific understanding that states had exclusive control of water within their streams, subject only to federally reserved rights and the navigation servitude. Whittaker, "The Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities," 10 *Harvard Environmental Law Review* 135, 168 (1986) (hereinafter "Whittaker").

B. The Legislative History Of The Federal Power Act Does Not Support A Finding of Pre-Emption

The extent of FERC jurisdiction and the reach of the Federal Power Act cannot be understood without a thorough consideration of the history of the historical alignment between state and federal authority over water use, both prior and subsequent to its enactment. *See* Whittaker, at 136-54.[4] Significantly, lengthy debate occurred, prior to passage of the 1920 Federal Water Power Act, 16 U.S.C. §803 (1982 & Supp. 1986). This legislation preserved states' rights while promoting the federal goal of hydroelectric development. *Id.* at 153.

The explicit language of the Federal Power Act provides that licensees, rather than the federal government,

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[3]Stat. 388, 390 (codified as amended at 43 U.S.C. §383 (1982)).

[4]A thorough history of the federal legislation is set forth in the Whittaker article.

are liable for damages. Section 10(c), 16 U.S.C. §803(c)(1982 & Supp. 1986) provides, in part:

> Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

16 U.S.C. 803(c)(1982 & Supp.1986).

Defendant repeatedly refers to 16 U.S.C. §803(c) and 825p, emphasizing the allegedly "comprehensive federal scheme" of the Federal Power Act. Defendant fails, however, to specify *in what area* the Act is alleged to be comprehensive, thus "occupying the field."

In *New York Department of Social Services v. Dubino,* 413 U.S. 405 (1973), this Court rejected a pre-emption challenge which was similar to Defendant's argument in this case. The Court squarely rejected:

> the contention that pre-emption is to be inferred merely from the comprehensive character of the federal work incentive provisions. Given the complexity of the matter addressed by Congress in WIN (the Federal Work Incentive Program), a detailed statutory scheme was both likely and appropriate completely apart from any questions of pre-emptive intent.

Id. at 415.

In recent years, the Supreme Court has been reluctant to find pre-emption solely from a perceived need for uniform national rules. Whittaker at 171 (citing *Goldstein v. California,* 412 U.S. 546, 558 (1973) (drastically curtailing blanket federal pre-emption of copyright and patent laws)

(other citations omitted)). The exercise of state police powers against challenges of federal pre-emption has been increasingly upheld. *See, e.g. International Paper Co. v. Oullette,* 479 U.S. 481, 499 (1987) (Clean Water Act does not bar common law nuisance suit filed in state of source of pollution); *Silkwood v. Kerr-McGee,* 464 U.S. 238, 256 (1984) (Atomic Energy Act does not pre-empt the recovery of punitive damages by a person injured through exposure to radioactive materials); *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 336 (1973) (Water Quality Improvement Act does not pre-empt common law claims for damages for oil spillage); *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 445 (1960) (absent clear manifestation of Congressional intent to pre-empt state common law remedies, the presumption of continuing state authority cannot be rebutted, and the states, through their judicial systems, will be free to provide compensatory remedies.)

As this Court stated in *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947):

> We start with the assumption that the historic police powers of the States were not to be superseded by a Federal Act unless that was the clear and manifest purpose of the Congress.

Id. at 230.

The Federal Power Act contains no such clear and manifest purpose and the legislative history fails to suggest any such purpose. Consequently, unless the exercise of police powers would conflict with the federal scheme of the Federal Power Act, those police powers are not superseded.

Pennsylvania does not seek to regulate or supervise the operation of hydroelectric dams. Rather, the state seeks to provide a remedy for its citizens whose property is damaged through acts of negligence of the private owner operator(s). This in no way conflicts with the federal scheme of promoting development of hydroelectric power. *Cf. First Iowa*, 328 U.S. 152, 179 (1945)(pre-empting state regulations which attempted directly to regulate design and operation aspects of federally licensed dam).

III. THE DECISION OF THE SUPERIOR COURT OF PENNSYLVANIA IS CONSISTENT WITH THIS COURT'S DECISION IN *PAN AMERICAN PETROLEUM CORP. v. SUPERIOR COURT OF DELAWARE* IN HOLDING THAT THE "EXCLUSIVE JURISDICTION" PROVISION OF SECTION 825p DOES NOT FORECLOSE STATE COURTS FROM HEARING STATE LAW TORT ACTIONS AGAINST LICENSEES

The Superior Court of Pennsylvania relied on the decision of this Court in *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961) in correctly rejecting Defendant's "exclusivity" argument.

As stated above, the Federal Power Act does not pre-empt state law tort actions. Defendant appears to contend, however, in what may only be a semantic difference in Defendant's argument, that even though state law is not pre-empted, the "exclusive jurisdiction" language divests state courts of subject matter jurisdiction to hear state law actions brought against licensees. *See*, Petition, Section I.C. at 15-17.

In *Pan American*, the United States Supreme Court considered the question of whether Delaware courts had

jurisdiction to hear a common law breach of contract action between two corporations subject to regulation under the Natural Gas Act, 15 U.S.C. §717, *et seq.* (1982). The Petitioners in *Pan American* argued, as does Defendant in this case, that the Natural Gas Act deprived the state courts of subject matter jurisdiction over the state law claims.

In *Pan American,* the parties had entered into contracts for the purchase of natural gas. *Id.* at 558. Subsequently, a decision of the Corporation Commission of the State of Kansas fixed a minimum price which had the effect of requiring Cities Service (the plaintiff) to pay a higher rate than specified in the contract. Cities Service petitioned for judicial review of that order and, in the interim, attached with each check a notation that payment was tendered subject to the terms of the original contract between the parties. *Id.* at 658-59.

When the United States Supreme Court reversed the order of the Kansas Corporation Commission's minimum rate order, Cities Service sued in Delaware State Court to recover the overcharges paid under the terms of the Kansas order. *Id.* at 661. The defendants filed petitions for writs of prohibition, attacking the jurisdiction of the Delaware courts to hear the action. The Supreme Court of Delaware sustained the jurisdiction of the Delaware courts. *Id.*

On appeal to the United States Supreme Court, defendants argued that, under the Natural Gas Act, prices paid for natural gas sold wholesale in interstate commerce were required to be in accordance with rates filed with the Federal Power Commission, and that since the actions filed by Cities Service involved filed rates, defendants

argued the actions must either be to enforce or challenge such rates. *Id.* at 662.

Defendants, arguing that the state courts were without jurisdiction, relied on the language of Section 22 of the Natural Gas Act, 15 U.S.C. §717r (1982), which is identical to the language of §825p of the Federal Power Act. Section 717r provides that:

> The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this [statute] or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this [statute] or any rule, regulation, or order thereunder.

15 U.S.C. § 717r (1982).

The Supreme Court held that the rights asserted by Cities Service were traditional common law claims which "[did] not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas." *Pan American,* 366 U.S. at 663. Addressing the argument for "exclusivity" under §22 (15 U.S.C. §717r (1982)) of the Act, the Court stated:

> Nor does §22 of the Natural Gas Act help petitioners. "Exclusive jurisdiction" is given the federal courts but it is "exclusive" only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, *not the generator of jurisdiction because of which state courts are excluded.*

Id. at 664 (emphasis supplied). The Court clearly found that claims brought under state law were distinct from

claims brought under the Act, and that such claims were actionable in a state forum.

Similarly, in *Airco Alloys Division, Airco, Inc. v. Niagara Mohawk Power Corp.*, 65 A.D.2d 378, 411 N.Y.S.2d 460 (1978), plaintiffs, purchasers of electric power from defendant Niagara Mohawk, brought an action in state court seeking a mandatory injunction and money damages arising from Niagara Mohawk's alleged breach of contract. 411 N.Y.S.2d at 462. The defendants moved to dismiss, arguing that the state courts lacked jurisdiction pursuant to §825p of the Federal Power Act, granting "exclusive jurisdiction" to federal district courts. *Id.* at 463. Plaintiffs, as in the present case, responded that the suit was not for violation of any federal law, rule, regulation or order, and was not brought to enforce any liability or to enjoin any violation of federal law. Plaintiffs, instead, argued that the subject matter of the claim was for non-performance of a contract under New York law. *Id.* The court held that *even though the order licensing construction and operation of the facility was an order issued under the Federal Power Act, and exclusive jurisdiction over suits to enforce the liabilities or duties created by the order would be exclusively in the district courts, that order was not the source of the rights asserted by plaintiffs. Id.* The court held that if the Complaint asserted traditional contract rights and sought ordinary contract relief, jurisdiction would properly be found in the New York courts, regardless of the exclusive jurisdiction provisions in the Federal Power Act. *Id.* at 464. *Accord, Cleveland Electric Illuminating Co. v. City of Cleveland,* 50 Ohio App. 2d 275, 363 N.E.2d 759, 767 (1976)(claim for monies due; Federal Power Act does not bar a plaintiff from pursuing at his option remedies based solely on state law in state forums), *cert. denied,* 434 U.S.

856 (1977); *Delaware County Electric Cooperative, Inc. v. Power Authority of the State of New York*, 96 A.D.2d 154, 468 N.Y.S.2d 233, 236 (1983) (action to void letter agreement; exclusive jurisdiction provision of Federal Power Act does not divest New York courts of concurrent subject matter jurisdiction where complaint asserts rights and seeks relief based upon state law).

IV. THE CASE OF *SCHNEIDEWIND v. ANR PIPELINE COMPANY* IS NOT CONTROLLING IN THIS MATTER, NOR DOES IT PROVIDE A BASIS FOR HOLDING THAT THE FEDERAL POWER ACT PRE-EMPTS STATE TORT LAW

Defendant's contention that the case of *Schneidewind v. ANR Pipeline Company*, ____ U.S. ____, 108 S. Ct. 1145 (1988), is dispositive or that it provides a basis for ruling that the Federal Power Act provides exclusive jurisdiction to federal courts for cases involving state tort claims against operators of federally licensed hydroelectric dams is misplaced. Petition, at 22. In *Schneidewind*, this Court ruled that under the Natural Gas Act of 1938, 15 U.S.C. §717, *et seq.* (1982), a Michigan statute requiring a natural gas public utility in Michigan to obtain state approval before issuing long-term securities was pre-empted by the Natural Gas Act on the basis that the Michigan statute conflicted with the rate-regulation power of FERC under the Natural Gas Act. *Id.* at 1151. This case has little relevance to the issue now before this Court; namely, whether a state court has subject matter jurisdiction to apply its tort laws and rules of liability when an operator of a federally licensed hydroelectric dam commits negligent acts that harm the state's residents.

One of the purposes of Congress in enacting the Natural Gas Act was to create a comprehensive scheme of federal regulation of the transportation and sale of natural gas in interstate commerce for resale. *Northern Natural Gas Company v. State Corporation Commission*, 372 U.S. 84 (1963). Under the Natural Gas Act, FERC may exercise authority over the rates charged and facilities used by natural gas companies in this transportation and sale. This Court held in *Schneidewind* that the Michigan statute was a direct challenge to and in conflict with the Natural Gas Act and FERC's ability to regulate rates in these matters. *Schneidewind*, 108 S. Ct. at 1151.

Unlike the case at issue, the *Schneidewind* case involved an attempt by a state to regulate the natural gas industry in an area that was clearly pre-empted by federal law. The decision of the Court in *Schneidewind* affirmed that regulation of rates under the Natural Gas Act is reserved for federal, not state, regulatory agencies. *Id.* at 1155.

V. THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA HAS CORRECTLY HELD THAT THE LICENSING AUTHORITY GRANTED TO FERC DOES NOT INCLUDE THE POWER TO DISPLACE STATE TORT LAW

Although not discussed by Defendant, the Court of Appeals for the District of Columbia Circuit recently upheld the viability of state tort law as a remedy for damages caused by the operation of a federally licensed dam.

In *South Carolina Public Service Authority v. FERC*, 850 F.2d 788 (D.C. Cir. 1988) ("SCPSA"), the Court specifically held that the licensing authority granted to FERC

under the Federal Power Act does not include the power to displace existing state tort law.

The South Carolina Public Service Authority owned and operated a hydroelectric project on the Santee and Cooper Rivers near Charleston, South Carolina. This hydroelectric project, which included a 4.38 mile dam known as the Santee North Dam, was licensed by FERC under the authority of the Federal Power Act. Although the dam met prevailing engineering standards when it was built in 1942, recent scientific study indicated that it could fail during an earthquake, thereby flooding the downstream area. *Id.* at 789. When the hydroelectric project and dam came up for relicensing, FERC imposed a number of conditions on its continued operation, including an agreement by SCPSA to compensate all those whose property would be damaged as a result of a dam failure that could have been avoided by reconstruction to meet earthquake events. *Id.* at 790. Significantly, FERC attempted to hold SCPSA to a strict liability standard for property damage. FERC's acting chairman dissented from this requirement on the ground that a license condition requiring SCPSA to compensate property owners for damages caused by dam failure would be a usurpation of authority left to the states by Congress, beyond the Commission's authority. *Id.* Upon a denial by FERC for a rehearing, SCPSA filed suit challenging the legal basis for the compensation requirement.

The issue before the Court was: Whether the Commission (FERC) exceeded its authority under the Act when it conditioned the renewal of a license on the licensee's acceptance of strict liability for flood damage. *Id.* at 791. In analyzing the scope of FERC's licensing authority, the Court necessarily addressed the reach of federal power

with respect to areas of common law remedies traditionally held by the states. After analyzing the legislative history of the Federal Power Act, the Court concluded that Congress did not intend or authorize FERC to displace state tort law applicable to its licensees. *Id.* at 793.

The Court thoroughly analyzed the history of the Federal Power Act with a focus on the separation of state and federal power inherent in the Federal Power Act. In so doing, the *SCPSA* Court noted that:

> the legislative history of this Act "discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States."

Id. (quoting *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 171 (1946)); *See First Iowa*, at 174 (quoting remarks of Rep. William L. LaFollette, 56 Cong. Rec. 9810: "We are earnestly trying not to infringe the rights of the States.").

In its review of the legislative history of the Federal Power Act, the Court of Appeals stated that nothing in the Act granted authority to FERC to displace state laws governing tort liability. *SCPSA*, at 793. Moreover, the Court stated:

> Assuming, as the legislative history suggests we should, that Congress intended for §10(c) (16 U.S.C. §803(c)) merely to preserve existing state laws governing the damage liability of licensees, it follows that the Commission (FERC) may not encroach upon this state domain by engrafting its own rules of liability. In particular, the Supreme Court has explicitly warned about interpretations of the Act (FPA) that establish

> "futile duplication of two authorities over the same subject matter." *First Iowa,* 328 U.S. at 170, 66 S. Ct. at 194.

Id. at 795.

Furthermore, as the Court discussed, Congress indicated no intent to pre-empt or displace state law and expressed no concern that the policies of the Federal Power Act might be frustrated by a state court's actions.

In *SCPSA,* FERC argued that by requiring compensation, it had simply conditioned a license on the adoption of certain safety measures, and that such action was a proper exercise of FERC's statutory authority. *Id.* at 792. The Court rejected this position, stating:

> The Commission's interpretation seems even less tenable when one considers that its unique brand of "protection" would oust the states of their traditional authority to determine the rules of liability in tort. *See Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). As the Supreme Court noted in *FTC v. Bunte Bros., Inc.,* 312 U.S. 349, 351, 61 S.Ct. 580, 582, 85 L.Ed. 881 (1941), "in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interest in our federal scheme must always be in the background." Deference to these local interests requires that we decline to find in the Act "radiations beyond the obvious meaning or language unless otherwise the purpose of the Act would be defeated." *Id.*

Id. at 792[5] n.3 *(citing Georgia Power Co. v. Sanders,* 617 F.2d 1112 (5th Cir. 1980) (state's strong interest in avoiding displacement of its laws governing property rights held to apply to determine the appropriate compensation in condemnation actions under the Federal Power Act)).

Plaintiffs do not challenge the authority of FERC under the Federal Power Act to promote the development of hydroelectric power, to regulate wholesale rates in interstate commerce, or to issue licenses to private parties for the purpose of constructing, operating and maintaining dams and other project works. However, there is a clear distinction between the power of FERC to issue licenses and the power of states to provide, in the exercise of their traditional police powers, remedies to citizens for damages for injuries caused by the operation of such dams. *Id.* at 792; *Pike Rapids Power Co. v. Minneapolis, St. P. & S.S.M.R. Co.,* 99 F.2d 902, 911 (8th Cir. 1938); *Beaunit Corp. v. Alabama Power Company,* 370 F. Supp. 1044, 1051 (N.D. Ala. 1973).

Plaintiffs do not dispute the importance of regulatory and licensing policies under the Federal Power Act. Defendant fails to apprehend, however, the fact that the Federal Power Act does not embody a policy of ousting the states' traditional common law powers.

The liability of licensees for damages caused by their projects is a matter left by Congress to state law. As such, Plaintiffs' Complaint does not attack the fabric of a federal

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[5]In concluding that the Commission did not have the power to specify a *federal* rule of liability, and that *state law* would govern damage claims against licensees, the Court of Appeals did not address the question of whether Plaintiffs could pursue their state law tort claims in state courts.

regulatory scheme as claimed by West Penn Power Company, but rather seeks redress for damages through the application of state law as Congress had intended.

CONCLUSION

For the foregoing reasons, Plaintiffs-Respondents request that the Petition for a Writ of Certiorari to the Superior Court of Pennsylvania be denied.

Respectfully submitted,

November 3, 1988

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No. 88-7

In the Supreme Court of the United States

October Term, 1988

WEST PENN POWER COMPANY, a corporation,
Defendant-Petitioner,

v.

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE's HOLIDAY HARBOR, A Partnership and as Representative of a Class,
Plaintiffs-Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPERIOR COURT

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPERIOR COURT

The Brief in Opposition to Petition for Writ of Certiorari to the Pennsylvania Superior Court filed by Respondents (hereinafter "plaintiffs") highlights the need for review by this Court of the nationally important question presented in the Petition. Additionally, since the filing of the Petition, the trial court has certified this instant litigation as a class action which significantly broadens the direct applicability of this case. The description of the certified class (described hereinafter) presents a limitless number of questions affecting the design, construction, operation, and maintenance of federally licensed hydro-electric dams and the national policies affecting the nation's water resources and navigable waterways. A copy of the Opinion and Order of the trial court dated October 3, 1988 issued by the Court of Common Pleas of Washington County, Pennsylvania, which has not been reported officially, appears in Appendix A to this Reply Brief. By Order dated October 27, 1988, which Order has not been reported officially and which appears in Appendix B to this Reply Brief, the trial court made certain modifications to the October 3, 1988 Order.

PARTIES TO CASE

In response to plaintiffs' motion to certify a class, the Court of Common Pleas of Washington County, Pennsylvania, certified a class described as follows:

> All individuals or entities who suffered property damages in Pennsylvania between November 3 and November 6, 1985, as a result of the actions of West Penn Power Company, in obstructing and/or releasing

improperly flood waters from the Lake Lynn Dam and/or failing to adequately notify such individuals or entities.[1]

ARGUMENT

I. The Issue is Exclusive Jurisdiction Not Pre-emption

As explained at page 15 of the Petition, the issue herein is not pre-emption. Nevertheless, plaintiffs distort West Penn Power Company's position in the "Question Presented for Review" by the plaintiffs. The question is not whether Section 317 of the Federal Power Act, 16 U.S.C. §825p, pre-empts state law tort claims in their entirety, but whether Section 317 requires that such claims be litigated exclusively in a federal district court.

Pre-emption and exclusivity of jurisdiction are two distinct concepts (as plaintiffs expressly recognize at page 7 of their Brief in Opposition); the instant litigation is not a pre-emption case. Pre-emption relates to *what* law applies, while exclusivity of jurisdiction relates to *where* the case is to be tried. Plaintiffs attempt to confuse the issue by arguing that state law tort claims cannot be tried in federal district courts. Contrary to the statement at the bottom of page 7 of the Brief in Opposition, the diversity of jurisdiction provisions of the United States Code provide an example of cases in which state law tort claims must be tried in the federal district courts.

Plaintiffs state on page 6 of the Brief in Opposition that:

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[1]The trial court changed the wording of the class description from "business entities" to "entities" in its Order of October 27, 1988.

> Defendant West Penn Power Company's position is confusing and internally contradictory. While apparently arguing for "exclusivity" or pre-emption, West Penn Power Company concedes that the Federal Power Act does not pre-empt state law tort actions.

The foregoing is a blatant misstatement of West Penn Power Company's position. West Penn Power Company has never argued for " 'exclusivity' or pre-emption." As pointed out above, the two concepts are entirely different. Furthermore, West Penn Power Company has never made any concession contrary to its assertion that under the Federal Power Act state law tort claims must be brought exclusively in the federal district courts. The issue is not whether the Federal Power Act pre-empts actions for state law tort claims, but whether the Federal Power Act requires that state tort law claims be brought exclusively in the federal district courts.

West Penn Power Company has never contended that state law tort claims could not be litigated in the federal district courts. Plaintiffs apparently believe that exclusive jurisdiction in the federal district courts "pre-empts" their state law tort claims. That is not, and never has been, West Penn Power Company's position.

Thus, plaintiffs' arguments directed to pre-emption contained in pages 6-13 of the Brief in Opposition are not directed to the proper issue.

II. Schneidewind v. ANR Pipeline Company and Not Pan American Petroleum Corp. v. Superior Court of Delaware is Controlling

Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1961), is distinguishable because it is a contract case

which is governed by the agreement entered into by the parties. The focus of the controversy was on the rights expressed in the contract, not on the rights and duties established by the Federal Energy Regulatory Commission ("FERC") pursuant to its licensing procedures for the design, construction, maintenance, and operation of a hydro-electric facility.

Here plaintiffs' case is brought in negligence and absolute liability, not in contract. Plaintiffs' reliance on *Pan American* and the other cases in Section III of their Brief in Opposition is flawed because private contractual arrangements do not affect design, construction, maintenance and operation of a hydro-electric dam controlled by a license issued by the FERC. In all of the cases cited by plaintiffs in Section III, the primary relief sought is asserted in terms of traditional contract rights which do not affect FERC. Here, however, the tort claims made by plaintiffs attack FERC's licensing procedures and thus, FERC's dominion or control over water resources and navigable waterways.

The nature of the liability alleged by plaintiffs has been clearly focused by the trial court in its Order of October 3, 1988 (App. A to Reply Brief). In that Order, the trial court identifies three issues to be decided:

> 1. Whether the defendant, West Penn Power Company, during November 1985 was negligent in obstructing and or releasing improperly flood waters from the Lake Lynn Dam during November 3-6, 1985 and/or in failing to adequately notify the individuals or entities who suffered property damages.
>
> 2. Whether the negligent actions, if any, of the West Penn Power Company during the aforesaid period was a proximate cause of property damages suffered by the plaintiffs.

3. Whether the maintenance and operation of the hydro-electric project known as the Lake Lynn Dam, by its defendant West Penn Power Company, was an abnormally dangerous activity of the defendant, and whether the maintenance of such alleged dangerous instrumentality by the defendant Power Company was a proximate cause of any harm to the plaintiffs.

The foregoing issues are clearly controlled by the federal license issued by FERC (App. A to Petition) to West Penn Power Company and FERC Regulations governing federally licensed hydro-electric facilities. A uniform scheme of enforcement is critical to the preservation and control of this country's water resources and navigable waterways. This avoids having a licensee such as West Penn Power Company operate its dam in accordance with the kaleidoscopic variations of a multitude of local court decisions. This is only achieved through the Congressionally mandated exclusive jurisdiction requirement of the Federal Power Act, 16 U.S.C. §825p. The federal courts are not likely to have a parochial view of circumstances such as those involved in the case at bar.

Although *Schneidewind v. ANR Pipeline Company*, U.S. , 108 S. Ct. 1145, 99 L.E. 2d 316 (1988) is not an exclusivity of jurisdiction case, it clearly provides the basis for the decision in this case. As in the Natural Gas Act, 15 U.S.C. §717, *et seq.*, the Federal Power Act gives FERC substantial powers and obligations. Some of those powers require FERC to regulate and control the design, construction, maintenance and manner of operating a licensed hydro-electric facility to develop this nation's water resources. According to *Schneidewind*, attempting to infringe on the decisions of FERC may create a conflict with those decisions. Here, plaintiffs, by challenging West

Penn Power Company's federally approved design, construction, operation and maintenance of the dam, bring this case squarely within the Federal Power Act, 16 U.S.C. §803(c) and 16 U.S.C. §825p and require that the case be brought only in the federal district court.

III. South Carolina Public Authority v. FERC is Consistent with Petitioner's Position

The question before the court in *South Carolina Public Service Authority v. FERC*, 850 F.2d 788 (D.C. Cir. 1988), was not exclusivity of jurisdiction, but was whether FERC exceeded its authority when it conditioned the renewal of a license upon acceptance of strict liability for property damages caused by an earthquake-induced flood. The court held that FERC exceeded its authority when it attempted to replace state tort law with its own system of compensation. This is consistent with West Penn Power Company's position. Federal courts can and do adjudicate state law claims. Such is the system devised in the Federal Power Act and which is applicable here. No contention is made that state tort law is displaced, only that the federal courts must apply the state tort law.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

CIVIL DIVISION

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, A partnership and as Representative of a Class,
Plaintiffs,

v.

WEST PENN POWER COMPANY, a corporation,
Defendant

No. 271 November Term, 1985 A.D.

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OPINION and ORDER OF THE COURT

Rodgers, J.
October 3, 1988.

In November, 1985 the plaintiffs filed a class action complaint against the defendant, West Penn Power Company, in the Court of Common Pleas of this county, seeking recovery for property damage caused by the release of waters from the Lake Lynn hydro-electric dam on the Cheat River in West Virginia operated by the defendant in early November 1985.

The plaintiffs' complaint stated common law causes of action based upon negligent release without notice of waters from the dam, and the alleged operation by the defendant power company of an abnormally dangerous instrumentality.

From the outset the defendant has taken the position that this court is without jurisdiction because exclusive jurisdiction rests with the federal district court. After removal, Judge Bloch of the United States District Court for the Western District of Pennsylvania remanded the action to this court on August 13, 1986. This court overruled defendant's Preliminary Objections to jurisdiction, but certified its order to a controlling question of law to the Superior Court of Pennsylvania on June 12, 1986. On August 25, 1987, the Superior Court confirmed the jurisdiction of this court. The Supreme Court of Pennsylvania denied the defendants' petition for allowance of appeal on April 11, 1988. Defendant, on July 1, 1988 filed a petition for Writ of Certiorari to the United States Supreme Court which apparently is still pending.

On February 2, 1988, the plaintiffs petitioned for Certification of Class Action, and this court has conducted hearings on the motion for class certification on April 11, 1988, April 19, 1988 and May 19, 1988. Extensive discovery has been conducted. The court has directed the parties to submit pretrial statements in this matter by November 15, 1988, and that a pretrial conference be held on November 22, 1988. Defendant has also filed motions for summary judgment and judgment on the pleadings which the court will also hear on November 22, 1988.

After consideration of the extensive briefs and arguments of counsel, this court will grant the plaintiff's motion for class certification limited to particular issues, subject, however, to revocation, alteration or amendment for cause shown before a decision on the merits.

After consideration of all relevant testimony, depositions, admissions and other evidence, this court makes the following findings:

Between November 3 and November 6, 1985 a flood of record proportions occurred in the Monongahela River Basin in northern West Virginia and southwestern Pennsylvania, doing extensive damage to numerous homes and businesses.

The Monongahela River Basin is composed of three river basins, the Tygart River Basin, the West Fork River Basin and the Cheat River Basin. The Tygart River and West Fork join at Fairmont, West Virginia to form the Monongahela River. The Cheat River and Monongahela River join at Point Marion on the boundary between Greene and Fayette Counties in western Pennsylvania, and near the boundary of northern West Virginia.

At the time of this flood, the defendant, West Penn Power Company, operated a project known as the Lake Lynn hydro development, located on the Cheat River about three miles upstream from Point Marion. The Lake Lynn Dam has been duly licensed by the Federal Power Commission, now the Federal Energy Regulatory Commission. It was constructed for the generation of electricity and not for flood control, but defendant's license does require that it not release from the Lake Lynn Reservoir during flood periods, flows that would exceed those which would have occurred in the absence of the project.

The heaviest rainfall during this period fell in the Cheat River Basin which, unlike the Tygart River Basin, lacks flood control facilities.

At the height of the flood about November 5, 1985, the power house and other facilities of the defendant at Lake Lynn began to flood and the employees were compelled to leave their post for a time.

The plaintiffs, the Engles, who own a marina, with boats and boating facilities at the confluence of Ten Mile Creek and the Monongahela river, where the Monongahela River enters Washington County flowing northward, on behalf of themselves and other residents and entities of Pennsylvania, in Washington, Greene, Fayette and Allegheny Counties, claim in this suit that the defendant power company did not make adequate plans for handling the flood waters of the Cheat River, which they knew had to pass through Lake Lynn, and that without notice to them, the defendant released large quantities of water at improper times and in improper amounts substantially contributing to the damages which they have suffered.

The defendant power company denies any such negligence and has presented expert testimony that, in fact, its operation of the Lake Lynn facility reduced what would have been the natural flood crest by at least four feet. The plaintiffs' expert, Mr. Cahill, has expressed a preliminary opinion that the defendant's actions may have substantially contributed to the damages suffered by the plaintiffs but, was unable, at the hearings on Class Certification to give a definitive opinion. However, discovery still continues and the plaintiffs have been directed to include their experts' reports in their pre-trial statement to be filed on or before November 1, 1988.

Plaintiffs have presented evidence that, at the time of hearing, the purported class included about 133 property owners in Washington County, including 48 in the town of Millsboro, 34 in Fredericktown and 12 in Clarksville; 19 in Greene County, including 11 in Greensboro and 5 in Point Marion; 3 in Fayette City and 5 in Dravosburg in Allegheny County.

The plaintiffs have also presented evidence that the 133 purported class members in Washington County have damages estimated to be in excess of $7,000,000.00 with individual claims ranging from under $10,000.00 to over $1,000,000.00.

The defendant has presented evidence that at least 3 individual cases have been filed in Washington County involving about 90 plaintiffs, with total damages claimed to be in excess of $500,000.00 and another with 3 plaintiffs claiming damages in excess of $10,000.00. An individual action is also filed against West Penn by Green Cove, et al., in this court and the United States District Court for the Western District of Pennsylvania. One of the other cases in this county involves 9 plaintiffs, each with a claim under

$10,000.00 which has been assigned to an arbitration docket; 2 cases have been filed in Westmoreland County involving 35 and 9 plaintiffs respectively.

Initially the plaintiffs sought certification of a class to be described as follows:

> All individuals or business entities who suffered property damage as a result of the actions of West Penn Power Company during November 1985 in obstructing and/or releasing improperly flood waters from the Lake Lynn Dam and/or failing to adequately notify the residents of Washington County, Pennsylvania.

Subsequently plaintiffs filed an Amended Motion for Class Certification after the hearings held in this matter as follows:

> All individuals or business entities who suffered property damage in the geographical area from Point Marion, Pennsylvania, to Maxwell, Pennsylvania, from November 3-6, 1985, as a result of the actions of West Penn Power Company in obstructing and/or releasing improperly flood waters from the Lake Lynn Dam and/or failing to adequately notify the residents of Washington County, Pennsylvania.

The class to be certified, of course, rests within the sound discretion of the court, Pa.R.C.P. 1710.

Pa.R.C.P. 1702 says this:

> One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if
>
> (1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and

(5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

The criteria for certification in determining whether the class action is a fair and efficient method of judication are set forth in detail in Pa.R.C.P. 1708. Preliminarily, however, this court must consider the claim of the defendant, that no class can be certified in the absence of any evidence that it was negligent or that such negligence was a proximate cause of plantiffs' harm. The defendants purport to rely on Allegheny County Housing Authority v. Berry, 338 Pa. Super. 338, 487 A.2d 995 (1985). However, Pa.R.C.P. 1707 (c) says "The hearing shall be limited to the Class Action Allegations". In Berry, the Superior Court points out, the tenants did not show that their claims against the landlord of uninhabitability involved a common question of fact as required by Pa. R.C.P. 1702.

Similarly the defendant relies upon Cook v. Highland Water and Sewer Authority, 108 Pa. Commw. 222, 530 A.2d 499 (1987), where again the court found there was no common question of fact.

This court has found helpful the opinions of Judge Weinstein, in re "Agent Orange" Product Liability Litigation, particularly, 100 F.R.D. 718 at 722 et. seq. (1983); the "Agent Orange" litigation eventually involved about

240,000 claimants who brought suit against manufacturers of various herbicides containing dioxin, as well as the federal government. Even though there were numerous other issues, Judge Weinstein certified a class action as to the manufacturers, on the grounds that there was a common question of general causation and a common question of the applicability of the "military contract" defense; that these common questions predominated over any question affecting only individual members, since a favorable decision for the defendants on these issues would end the litigation in their favor, and a favorable decision on behalf of the plaintiffs would remove these issues which would otherwise consume an enormous amount of time in further litigation.

Judge Weinstein further discusses the class action aspects of the "Agent Orange" litigation in 597 F. Supp. 740 at 755 et seq. (1984). He pointed out, 597 F. Supp. at 782, that "since no motion for summary judgment based on inability to demonstrate causation was made, the exact evidence plaintiffs were relying upon to satisfy the burden of proof on the issue was never fully set forth." A settlement of $180,000,000.00 in the class action was, therefore, approved even in the absence of evidence of any proximate cause.

The weakness of the plaintiffs' claim of causation is further emphasized by Judge Weinstein's decision, in another aspect of the "Agent Orange" litigation, 611 F. Supp. 1223, (1985), where he granted the motion of defendant chemical companies for summary judgment against the Vietnam veterans and members of their families, who had opted out of the class previously certified, on the ground that plaintiffs had failed to provide evidence of causation, among other reasons.

The settlement of the "Agent Orange" product liability litigation was affirmed by the Circuit Court of Appeals, 818 F. 2d 145 (1987), concluding that the action was properly certified as a class action on the basis of the centrality of the question of the military contractor defense.

In the case at bar, the putative class members are claiming property damages rather than personal injury, and the difficult question of medical causation is not present.

Nevertheless, the defendant contends that the proximate cause is individual to each plaintiff, depending upon the location of the plaintiffs' property above the natural flood crest. Moreover, this defendant has presented expert testimony that, its actions reduced the natural flood crest and, therefore, could not be a proximate cause of injury to any of the purported class members. If a jury were so persuaded on the merits this litigation would then end in favor of the defendant.

But the defendant concedes at this stage, it is possible, that the plaintiffs may later present evidence that the natural flood crest was increased by the action or inaction of the defendant. However the defendant claims that Mr. Engle, may have been damaged by the natural flood crest, while class members, whose property was at a higher elevation, escaped damage.

The Restatement, Torts 2nd §432, says this

> (1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.
>
> (2) If two forces are actively operating, one because of the actor's negligence, the other not because of any

misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.

Illustrations:

1. A statute requires all vessels plying on the Great Lakes to provide lifeboats. One of the A Steamship Company's boats is sent out of port without any such lifeboat. B, a sailor, falls overboard in a storm so heavy that had there been a lifeboat it could not have been launched in the sea then running. B is drowned. The A Company's failure to provide lifeboats is not a cause of B's death.

2. A dams a stream running through his own land. The dam is negligently constructed in that it is not sufficiently strong to confine the water from the freshets which occur from time to time in the spring. A sudden cloudburst of unprecedented severity sweeps the dam away, causing the water collected by it to overflow the land of B. The flood caused by the cloudburst is so great that it would have burst the dam even had it been properly constructed. A's negligent construction of the dam is not a cause of the inundation of B's land.

3. Two fires are negligently set by separate acts of the A and B Railway Companies in forest country during a dry season. The two fires coalesce before setting fire to C's timber land and house. The normal spread of either fire would have been sufficient to burn the house and timber. C barely escapes from his house, suffering burns while so doing. It may be found that the negligence of either the A or the B Company or of both is a substantial factor in bringing about C's harm.

> 4. The same facts as in Illustration 3, except that the one fire is set by the negligence of the A Company and the other is set by a stroke of lightning or its origin is unknown. It may be found that the negligence of the A Company is a substantial factor in bringing about C's harm.

The defendant's argument improperly utilizes the costs-benefits approach used in evaluating whether the construction of a flood control dam is economically justified, to determine legal or proximate cause. But, assuming that the defendant's negligence allowed an increased volume of water to be added to the natural flood crest, the increased volume created by the defendant's negligence, would not flow as a separate layer over the "natural flood crest", but the natural crest and the waters attributed to the defendant's negligence, would join together, as two active forces to inflict harm. In that situation, it would be for the jury to determine whether the negligence of the defendant was a substantial contributing factor. See B & O Railroad v. Sulfur Springs, 96 Pa. 65, (1880), and the dissenting opinion of Judge Kalish, Cook v. Highland Water and Sewer Authority, 530 A.2d at 506.

In addition to the issue of general causation, there is a common question as to whether the defendant's actions or inactions were negligent, and also, whether the defendant was maintaining an abnormally dangerous instrumentality by the operation of its hydro-electric dam. It may well be that the defendant may ultimately prevail on one or more of these common questions, either on its motion for summary judgment or after trial on the merits. In any event, such a finding in this court's opinion, would greatly advance this litigation, and such common questions predominate over any question affecting only individual

members, such as, the amount of their damages and whether they took necessary steps to mitigate their damages.

It is also obvious in view of the number of claimants and the extent of the damages the prerequisite of numerousity is present. The claim of the Engles, and such other class representatives as may choose to intervene, is typical, that is, they all claim this defendant was negligent, that its negligence was the proximate cause of their harm, and that the defendant was maintaining an abnormally dangerous instrumentality.

In the absence of one trial of these class action issues, it is also clear that several hundred individual cases may have to be tried.

The court finds that the size of the class and the difficulties likely to be encountered in the management of the action as a class action as to these issues, is not significant. However the fact that individual actions might result in inconsistent verdicts, would not, in itself, dictate against individual actions, nor is there any claim that this defendant would be unable to pay all of the claims, if they proceeded as individual actions. However, as a practical matter, as demonstrated in the "Agent Orange" Litigation, those individuals who decide to proceed with individual actions may be confronted with summary judgments rendered against them, even if the class members succeed in securing some settlement.

It is true that numerous other individual actions have been commenced, but most of such actions are in Washington County, Pennsylvania, and involve the same common issues as are present in this class litigation, and persons who have filed individual actions, will of course, be

permitted to exclude themselves from this class action. Of course, if they prefer to be included they may be represented by their own counsel.

This court would gladly transfer this entire litigation to another county or to the Federal Court but it is apparent that the bulk of the claims have been and will be filed for residents and businesses located in Washington County.

Some of the claims of the individual class members are sizable, but on the other hand, there are other claims which are insufficient in amount to support separate actions. Indeed, some of these claims are arbitration size. It is obvious that several million dollars is here involved and the amount that may be recovered by individual class members, on the average, will not be so small in relation to the expense and effort of administering the action as not to justify a class action. This court finds that the class action as to limited issues, will provide a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Plaintiffs' counsel has filed his affidavit, that he will provide sufficient funds to fairly and adequately assert and protect the interest of the class in accordance with the criteria set forth in Rule 1709, and this court finds no conflict of interest in the maintenance of the class action.

The defendant has objected to the plaintiffs' attempt to limit the class to persons or business entities who suffered property damage in the geographical area from Point Marion, Pennsylvania, to Maxwell, Pennsylvania from November 3-6, 1985.

It is true that the plaintiffs' expert, Mr. Cahill, indicated that he did not believe that persons further downstream than Maxwell, Pennsylvania, suffered any harm as

a result of the defendant's actions. Nevertheless, since discovery was not complete at the time Mr. Cahill testified, this court will, at this time include in the class, individuals or business entities in Pennsylvania who suffered such property damage, from November 3 through November 6, 1985.

ORDER OF COURT

AND NOW, this 3rd day of October, 1988, the motion of the plaintiffs, John H. Engle, et al., for class action certification is granted.

The class is described as follows:

All individuals or business entities who suffered property damage in Pennsylvania between November 3 and November 6, 1985, as the result of the actions of West Penn Power Company, in obstructing and/or releasing improperly flood waters from the Lake Lynn Dam and/or failing to adequately notify such individuals or entities.

Every member of the class is included unless by, December 31, 1988 the member files of record a written election to be excluded from the class. This class action shall be limited to these issues:

1. Whether the defendant, West Penn Power Company, during November 1985 was negligent in obstructing and or releasing improperly flood waters from the Lake Lynn Dam during November 3-6, 1985 and/or in failing to adequately notify the individuals or entities who suffered property damages.

2. Whether the negligent actions, if any, of the West Penn Power Company during the aforesaid period was a proximate cause of property damages suffered by the plaintiffs.

3. Whether the maintenance and operation of the hydro-electric project known as the Lake Lynn Dam, by its defendant West Penn Power Company, was an abnormally dangerous activity of the defendant, and whether the maintenance of such alleged dangerous instrumentality by the defendant Power Company was a proximate cause of any harm to the plaintiffs.

This order is conditional and before a decision on the merits, may be revoked, altered or amended for cause by the court on its own motion, or on the motion of any party.

A supplemental order with respect to the notice to be given will be entered pursuant to Pa. R.C.P. 1712. This court will meet with counsel to consider the type, content, and method of notice on Thursday, October 27, 1988 at 10:00 o'clock a.m.

/s/ SAMUEL L. RODGERS, J.

Samuel L. Rodgers, J.

APPENDIX B

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA CIVIL DIVISION

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, a Partnership and as Representative of a Class,
Plaintiffs

v.

WEST PENN POWER COMPANY, a corporation,
Defendant.

No. 271 November Term, 1985 A.D.

ORDER OF COURT

AND NOW, this 27TH day of October, 1988, this was the time set for a conference to consider the type, content and method of notice in this class action, and also to consider any changes that might be made in this Court's Order of October 3, 1988.

After conference with counsel, the Court affirms its Order of October 3, 1988 except as follows:

The Order of October 3, 1988 described the class as all individuals or business entities who suffered property damage in Pennsylvania, and the Court has been informed that other entities besides business entities may have a claim in this matter and the Court changes the description of class by striking the word "business" so it will read, "all individuals or entities."

The Court's Order also provided that every member of the class is included unless by December 31, 1988 the member files of record a written election to be excluded from the class. After considering the proposed schedule of notice in newspapers in the appropriate area, it appears that the last notice will not appear probably until the week of December 5, 1988, and this may not allow sufficient time for every member of the class who wishes to opt out to exclude himself. Accordingly, the Order of October 3, 1988 is amended to read, "Every member of the class is included unless by January 31, 1989, the member files of record a written election to be excluded from the class."

James Zeszutek, Esquire, has been designated at this time, until further Order of the Court, to serve as counsel for the class and he has presented a proposed notice of class action which the Court will consider and it has been made available to the defendant, and the Court has asked the parties, within one (1) week to confer and then respond to the Court as to the contents and type and method of notice. The parties at the present time appear to agree that the notice be given by newspaper of general circulation in the five (5) county area of Allegheny, Westmoreland, Fayette, Greene and Washington Counties. At the end of that one (1) week period, the Court will issue a supplementary Order specifying the content, type and method of notice, and providing that any member of the class may, within ten (10) days, file objections which the Court will consider. In view of this time table, the Court has also opened discovery period in this class action and extends the discovery period to April 1, 1989, at which time all discovery will terminate unless further extended by Order of Court.

Accordingly, the arguments on the pending motions for summary judgments and briefs will be rescheduled after the close of the discovery period, at which time the Court will also schedule a pre-trial conference.

By the Court,

/s/ SAMUEL L. ROGERS, J.
Samuel L. Rodgers, J.